

**A Muniyandi a/l Periyar & Anor v
Eric Chew Wai Keat & Anor**

HIGH COURT (TAIPING) — CIVIL APPEAL NO 11-1 OF 2001
VT SINGHAM J
15 MAY 2003

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Civil Law Act — Damages — Fatal accident — Dependency claim — Whether 1/3 deduction on damages for loss of support to be made — Civil Law Act 1956 s 7(2)

C

Evidence — Documentary evidence — Agreed bundle — Admission of death certificate which indicated time of death — Whether defendants should be allowed to dispute time of deceased's death

D

Road Traffic — Negligence — Road accident — Deceased motorcyclist lying on road after collision with cyclist — Second defendant's motorcar collided into deceased — Second defendant saw people gathered at the scene but failed to avoid colliding into deceased — Whether a prudent driver who was confronted with similar situation would have immediately slowed down on seeing people gathered at the scene — Whether second defendant was negligent

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Tort — Negligence — Causation — Deceased motorcyclist lying on road after collision with cyclist — Second defendant's motorcar collided into deceased — Whether plaintiff succeeded in establishing causative link between deceased's death and negligent act of second defendant — Whether inference to be drawn from evidence was that deceased was alive when second defendant's motorcar collided into him

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Tort — Negligence — Contributory negligence — Deceased motorcyclist lying on road after collision with cyclist — Second defendant's motorcar collided into deceased — Whether contributory negligence to be attached against deceased — Apportionment of liability

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This was an appeal by the first plaintiff against the decision of the magistrate in dismissing his dependency claim for loss of support against the defendants arising out of a road accident on 10 July 1996, in which the first plaintiff's son had died. The deceased had collided into the second plaintiff's bicycle. Immediately after the collision, and while the deceased was lying on the road, the defendant's motorcar collided into the deceased. The second defendant testified that the scene of the accident was dark at the material time and by the time he saw the deceased, he was too close and could not avoid colliding into him. The second defendant admitted during cross-examination that prior to colliding into the deceased, he did not know whether the deceased was alive or dead. In his police report, the second defendant stated that he had arrived at the place of accident on 10 July 1996 at about 8.05pm and that he had dragged the deceased for about ten feet after the collision. The time of death stated in the death certificate was 8.25pm on 10 July 1996 and the place of death was stated as 'on the

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way to a clinic in Trong'. The post-mortem report stated the cause of death as 'multiple crush injuries with fracture dislocation of cervical vertebrae C2 C1 due to motor vehicle accident'. The death certificate and the post-mortem report were in the agreed bundle of documents. The learned magistrate's reasons for dismissing the first plaintiff's claim were that: (a) the accident had occurred at 7.30pm and the second defendant only arrived at the place of accident at 8.05pm; (b) there were people gathered at the place of the accident and if the deceased was alive at the time when the first defendant's motorcar collided into him, it was more possible that the people who were gathered at the area would have given assistance; and (c) the plaintiff did not produce evidence to show the time when the accident occurred.

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Held, allowing the appeal:

- (1) The onus was on the first plaintiff to establish that there was a causative link between the deceased's death and the negligent act of the second defendant. Having regard to the contents of the death certificate, the post-mortem report, the evidence of the second defendant and his police report, there was sufficient evidence to indicate that the collision between the second defendant's motorcar and the deceased occurred at about 8.05pm and the deceased died at about 8.25pm while the deceased was on his way to a clinic at Trong. The sequence of events indicated that the deceased was initially taken to the clinic at Trong for treatment but when he died on the way, he was taken to the hospital at Taiping for post-mortem. Based on the totality of the evidence, the only reasonable inference that could be drawn was that the deceased must have been alive when the second defendant's motorcar collided into him and dragged him for a distance of ten feet and he died on the way to the clinic at Trong. This inference can further be supported by the cause of death stated in the post-mortem report. The multiple crush injuries which caused the death must have been attributed by the second defendant's motorcar which went over the deceased. Consequently, by agreeing to the death certificate and the post-mortem report, the defendants had admitted the contents as true and cannot now be allowed to retract from those admissions to the detriment of the first plaintiff's claim against the second defendant (see pp 549G, 550B-F).
- (2) If the defendants were seriously disputing the deceased's time of death, it was only prudent that they should not have agreed to the contents of the death certificate. Alternatively, the defendants' counsel should have made it clear at the beginning of the trial that it was a conditional agreement to the effect that it was agreed subject to cross-examination of the maker or that it was agreed

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- A without prejudice to the right of the defendant to challenge the time of death as stated in the death certificate. This conditional agreement would have put the plaintiff's solicitors on notice to consider whether further evidence was required on the issue as to the time of the death as stated in the death certificate.
- B However, these steps were not taken by learned counsel for the defendants. Therefore, the defendants' counsel should not be allowed to dispute the contents of the death certificate which supported the first plaintiff's claim against the second defendant (see pp 552D-F, 553C-D).
- C (3) In the circumstances, the evidence as contained in the death certificate and the post-mortem report had on the balance of probabilities established causation and the link leading to the deceased's death. Consequently, the burden was shifted to the defendants to displace, contradict or raise rebuttal evidence but they had failed to do so and were deemed to have accepted the evidence. Therefore there was no necessity for the plaintiff to prove what had already been agreed and admitted as evidence. Since the deceased cannot contradict any evidence put forward by the second defendant, the first plaintiff had to rely on the documentary evidence together with the oral evidence of the investigating officer to establish his case. Unfortunately, the learned magistrate had failed to consider this important aspect of the evidence and drew an inference on speculation. Had the learned magistrate considered that piece of documentary evidence, being the death certificate together with the second defendant's police report, it would have made a considerable difference to her conclusion where she held that the first plaintiff had not produced evidence as to the time when the accident occurred. The omission by the learned magistrate to consider the documentary evidence was fatal and rendered her conclusion unsustainable (see pp 553I-554B, E-F).
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- G (4) The learned magistrate did not make a finding on the material facts and evidence before the court and neither did she sufficiently consider the documentary evidence which was agreed to without any qualification and marked as exhibits. Her decision as a whole cannot be considered as a speaking judgment. The reasoning of the magistrate was not based on the evidence but purely on speculation and conjecture and without any legal basis (see pp 547D-E, 548A).
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- I (5) Any prudent driver who was confronted with a similar situation as faced by the second defendant would have immediately slowed down or even brought his motorcar to a complete stop towards the left side of the road especially on seeing people gathered at the scene where it was dark and after having seen 'something' on the middle of the road at a distance of 13ft. The second defendant did

not mention in his police report of having taken any evasive action on approaching the scene. The scratch marks to a distance of six metres as shown in the sketch plan, the second defendant's other admissions in his police report and his oral evidence in court for not being able to avoid the accident despite having seen the deceased at a distance of 13ft would tend to show that the second defendant must have been speeding and was not able to control his motorcar to bring it to a stop in order to avoid the collision. All these omissions and admissions on his part clearly had established negligence against the second defendant (see p 558F-I).

- (6) In view of the inference drawn by the High Court that the deceased must have been alive at the time when the second defendant's motorcar collided into him, the deceased ought to have at least sought help to remove himself away from the centre of the road so as not to cause any undue danger to other vehicles approaching the scene of the accident especially when it was dark. However, there was no evidence that the deceased had made any such attempt to be removed to the side of the road. On the other hand, the deceased could also have been lying unconscious on the road. In any event, the deceased himself cannot be free from blame for having created such a situation that might endanger other road users including the second defendant. There must be some contributory negligence attached against him on the facts in the instant appeal. Accordingly, damages had to be reduced to the extent that liability was apportioned equally between the deceased and the second defendant (see pp 561E-G, I).

- (7) The issue that the deceased's death was not caused by the second defendant was not specifically pleaded by the second defendant. The denial was not sufficiently specific and did not clearly and definitely raise the issue that the deceased was already dead when the second defendant's motorcar collided into him. By merely raising general averments or denials in the statement of defence without being specific was insufficient and cannot assist the second defendant to constitute such a denial as defence to the issue of causation. The second defendant should plead his own version of the facts and not merely deny the fact as pleaded in the statement of claim, as was done in the instant appeal (see pp 564B, F-G); *Natesan v Goh Gok Hoon* [1968] 2 MLJ 3 followed.

- (8) Although the Court of Appeal case of *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 which enunciated a $\frac{1}{3}$ deduction on damages for loss of support, was still binding on the High Court based on the doctrine of stare decisis, nevertheless, as the $\frac{1}{3}$ deduction was a matter of discretion based on the evidence, the High Court had a choice between *Takong*

- A *Tabari* and the decision of another panel of the Court of Appeal in *Tan Phaik See (Ibu kepada Tan Hock San (si mati)) dan Tan Cheng Gek (Ibu Kepada Ng Chin Chai (si mati)) lwn Chuah Seng Boon* Civil Appeal No P04-14 of 1996 where the Court of Appeal did not make the $\frac{1}{3}$ deduction but decided for a multiplier of 16 years. In the instant case, the High Court took the liberty to follow the decision of the Court of Appeal in *Tan Phaik See* and accordingly, the $\frac{1}{3}$ deduction on damages for loss of support was not made (see p 569E-H); *Tan Phaik See (Ibu kepada Tan Hock San (si mati)) dan Tan Cheng Gek (Ibu Kepada Ng Chin Chai (si mati)) lwn Chuah Seng Boon* Civil Appeal No P04-14 of 1996 followed.
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- (9) The first plaintiff had stated in his evidence that the deceased worked part-time after school hours between 3pm-6pm and his evidence was supported by that of the deceased's employer. Therefore, it cannot be disputed that the deceased was gainfully employed at the time of his death. Accordingly, a sum of RM75 per month for ten years amounting to RM7,800 as loss of support, RM10,000 towards bereavement and a sum of RM2,000 as funeral expenses were awarded to the first plaintiff. However, since the deceased had also contributed towards the accident, damages was reduced to the extent of 50% in contributory negligence as against the deceased (see pp 574H-575A, D, 576A).
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[Bahasa Malaysia summary]

- F Ini adalah satu rayuan oleh plaintiff pertama terhadap keputusan majistret yang menolak tuntutan tanggungan beliau untuk kehilangan penyara terhadap defendan-defendan yang timbul daripada satu kemalangan jalanraya pada 10 Julai 1996 di mana anak lelaki plaintiff pertama telah meninggal dunia. Si mati telah berlanggar dengan basikal plaintiff kedua. Selepas perlanggaran tersebut, dan semasa si mati terbaring di atas jalan, kereta defendan telah melanggar si mati.
- G Defendan telah memberikan keterangan bahawa tempat kejadian kemalangan tersebut gelap pada masa matan dan pada saat beliau nampak si mati, beliau berada terlalu dekat dan tidak dapat mengelak daripada melanggarnya. Defendan kedua mengaku semasa pemeriksaan balas bahawa sebelum melanggar si mati, beliau tidak tahu sama ada si mati hidup atau mati. Dalam laporan polis beliau, defendan kedua menyatakan bahawa beliau tiba di tempat kejadian kemalangan tersebut pada 10 Julai 1996 lebih kurang pukul 8.05pm adan bahawa beliau telah menarik si mati sejauh sepuluh kaki selepas perlanggaran tersebut. Masa kematian yang dinyatakan dalam sijil kematian adalah pukul 8.25pm pada 10 Julai 1996 dan tempat kematian dinyatakan sebagai 'on the way to a clinic in Trong'.
- H Laporan post-mortem menyatakan sebab kematian adalah 'multiple crush injuries with fracture dislocation of cervical vertebrae C2 C1
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due to motor vehicle accident'. Sijil kematian dan laporan post-mortem tersebut diletakkan dalam ikatan dokumen-dokumen yang dipersetujui. Alasan-alasan majistret yang bijaksana menolak tuntutan plaintif pertama adalah bahawa: (a) kemalangan telah berlaku pada pukul 7.30pm dan defendan kedua hanya tiba di tempat kemalangan pada pukul 8.05pm; (b) terdapat beberapa orang berkumpul di tempat kemalangan tersebut dan jika si mati masih hidup pada masa kereta defendan pertama melanggarnya, ia lebih berkemungkinan mereka yang berkumpul di kawasan tersebut memberikan bantuan; dan (c) plaintif tidak mengemukakan keterangan untuk menunjukkan masa bila kemalangan tersebut berlaku.

Diputuskan, membenarkan rayuan tersebut:

(1) Beban atas plaintif pertama untuk membuktikan bahawa terdapat hubungan akibat antara kematian si mati dan tindakan cuai defendan kedua. Berhubung kandungan-kandungan sijil kematian tersebut, laporan post-mortem, keterangan defendan kedua dan laporan polis beliau, terdapat keterangan yang mencukupi untuk menunjukkan bahawa pelanggaran antara kereta defendan kedua dan si mati berlaku lebih kurang pada pukul 8.05pm dan si mati meninggal dunia lebih kurang pada pukul 8.25pm semasa si mati dalam perjalanan ke sebuah klinik di Trong. Urutan kejadian menunjukkan bahawa si mati telah dibawa ke klinik di Trong untuk dirawat tetapi apabil beliau meninggal dunia dalam perjalanan, beliau telah dibawa ke hospital di Taiping untuk post-mortem. Berdasarkan keseluruhan keterangan, satu-satunya inferens yang munasabah yang boleh didapati adalah bahawa si mati mungkin masih hidup semasa kereta defendan kedua melanggarnya dan menarik beliau untuk jarak sejauh sepuluh kaki dan beliau telah meninggal dunia dalam perjalanan ke klinik di Trong. Inferens ini boleh disokong oleh sijil kematian dalam laporan post-mortem. Kecederaan-kecederaan patah yang pelbagai yang menyebabkan kematian tersebut mungkin telah disebabkan oleh kereta defendan kedua yang mengelek atas si mati. Akibatnya, dengan bersetuju akan sijil kematian dan laporan post-mortem tersebut, defendan-defendan telah mengakui kandungan-kandungan yang berikut adalah benar dan sekarang tidaklah boleh dibenarkan menarik balik pengakuan-pengakuan tersebut untuk menjejaskan tuntutan plaintif pertama terhadap defendan kedua (lihat ms 549G, 550B–F).

(2) Sekiranya defendan-defendan secara serius mempertikaikan masa kematian si mati, ia hanyalah bijak jika mereka tidak sepatutnya bersetuju dengan kandungan-kandungan dalam sijil kematian tersebut. Secara alternatif, peguam defendan-defendan sepatutnya menjelaskan dari mula perbicaraan bahawa ia satu perjanjian bersyarat tertakluk kepada pemeriksaan balas

- A** pembuatnya atau bahawa ia telah dipersetujui tanpa prejudis untuk hak defendan mencabar masa kematian tersebut sebagaimana yang dinyatakan dalam sijil kematian tersebut. Perjanjian bersyarat ini sepatutnya memberi notis kepada peguamcara plaintif untuk mempertimbangkan sama ada keterangan selanjutnya diperlukan berhubung persoalan tentang
- B** masa kematian sebagaimana yang telah dinyatakan dalam sijil kematian tersebut. Namun begitu, langkah-langkah tersebut tidak diambil oleh peguam yang bijaksana bagi pihak defendan-defendan. Oleh itu, peguam defendan-defendan tidak sepatutnya dibenarkan mempertikaikan kandungan-kandungan sijil kematian yang menyokong tuntutan plaintif pertama terhadap defendan kedua (lihat ms 552D-F, 553C-D).
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- (3) Dalam keadaan tersebut, keterangan yang terkandung dalam sijil kematian dan laporan post-mortem telah atas imbalan kebarangkalian membuktikan penyebab dan kaitan yang membawa kepada kematian si mati. Akibatnya, beban telah berpindah kepada defendan-defendan untuk mengubah, menyangkal atau menimbulkan keterangan pematahan tetapi mereka gagal untuk berbuat demikian dan dianggap telah menerima keterangan tersebut. Oleh itu tiada keperluan untuk plaintif membuktikan apa yang telah dipersetujui dan diakui sebagai keterangan. Memandangkan si mati tidak boleh menyangkal apa-apa keterangan yang diutarakan oleh defendan kedua, plaintif pertama terpaksa bergantung kepada keterangan dokumentar bersama keterangan lisan pegawai penyiasat untuk membuktikan kes beliau. Namun begitu, majistret yang bijaksana telah gagal untuk mempertimbangkan aspek penting keterangan dan membuat inferens berdasarkan spekulasi. Jika majistret yang bijaksana telah mempertimbangkan keterangan dokumentar tersebut, iaitu sijil kematian dan juga laporan polis defendan kedua, ia akan membuahkan perbezaan yang ketara terhadap kesimpulannya apabila beliau memutuskan bahawa plaintif pertama tidak mengemukakan keterangan berhubung masa bila kemalangan tersebut berlaku. Peninggalaan oleh majistret yang bijaksana untuk menimbangakan keterangan dokumentar tersebut membawa padah dan menyebabkan kesimpulannya tidak boleh dikekalkan (lihat ms 553I-554B, E-F).
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- H** (4) Majistret yang bijaksana tidak membuat penemuan atas fakta-fakta penting dan keterangan di hadapan mahkamah dan beliau juga tidak dengan mencukupi menimbangakan keterangan dokumentar yang telah dipersetujui tanpa apa-apa syarat dan ditanda sebagai ekshibit. Keputusan beliau secara keseluruhan tidak boleh dianggap sebagai satu penghakiman secara lisan.
- I** Alasan majistret tersebut tidak berdasarkan keterangan tetapi semata-mata atas spekulasi dan tekaan dan tanpa apa-apa asas undang-undang (lihat ms 547D-E, 548A).

- (5) Mana-mana pemandu yang berhati-hati yang berhadapan dengan situasi yang sama yang dihadapi oleh defendan kedua akan serta merta memperlahankan ataupun memberhentikan keretanya ke sebelah kiri jalan jika ternampak orang ramai berkerumun di tempat kejadian di mana ia adalah gelap dan selepas melihat 'something' di tengah jalan pada jarak 13 kaki. Defendan kedua tidak menyebutkan dalam laporan polis beliau yang beliau telah mengambil langkah-langkah mengelak semasa menghampiri tempat kejadian. Kesan-kesan calat dengan jarak enam meter sebagaimana yang ditunjukkan dalam pelan lakar, pengakuan-pengakuan lain dalam laporan polis dan keterangan lisan beliau dalam mahkamah kerana tidak dapat mengelak kemalangan tersebut walaupun nampak si mati dalam jarak 13 kaki sememangnya akan menunjukkan bahawa defendan kedua mestilah telah memandu dengan laju dan tidak dapat mengawal kereta beliau untuk berhenti bagi mengelak pelanggaran tersebut. Kesemua peninggalan dan pengakuan tersebut di pihak beliau dengan jelas menunjukkan kecuaiian terhadap defendan kedua (lihat ms 558F-I). A
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- (6) Berdasarkan inferens yang dibuat oleh Mahkamah Tinggi bahawa si mati mungkin masih hidup semasa kereta defendan kedua melanggarnya, si mati sepatutnya sekurang-kurangnya meminta bantuan mengalihkan beliau dari tengah jalan agar tidak menyebabkan apa-apa bahaya yang tidak berpatutan kepada kenderaan-kenderaan lain yang menuju ke arah tempat kejadian kemalangan lebih-lebih lagi apabila ia gelap. Namun begitu, tiada keterangan bahawa si mati telah membuat apa-apa percubaan untuk dialihkan ke tepi jalan. Sebaliknya, si mati mungkin terlantar tidak sedar diri atas jalan tersebut. Dalam apa keadaanpun, si mati sendiri tidak terkecuali dari menjadi bersalah kerana mewujudkan situasi yang mungkin membahayakan pengguna jalanraya lain termasuklah defendan kedua. Terdapat kecuaiian sertaan ke atas beliau berdasarkan fakta-fakta rayuan semasa. Justeru itu, ganti rugi perlu dikurangkan setakat mana liabiliti dibahagikan sama rata antara si mati dan defendan kedua (lihat ms 561E-G, I). E
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- (7) Persoalan berhubung kematian si mati tidak disebabkan oleh defendan kedua tidak diplidkan secara spesifik oleh defendan kedua. Penafian tidak mencukupi secara spesifiknya dan tidak dengan jelas dan tepat menimbulkan persoalan bahawa si mati telahpun meninggal dunia semasa kereta defendan kedua melanggarnya. Hanya dengan menimbulkan penegasan-penegasan atau penafian-penafian secara am dalam pernyataan pembelaan tanpa terperinci adalah tidak memadai dan tidak dapat membantu defendan kedua membentuk satu penafian sebagai satu pembelaan terhadap persoalan penyebab. Defendan kedua sepatutnya memplidkan versi fakta-fakta beliau H
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- A** sendiri dan bukan hanya menafikan fakta yang diplidkan dalam pernyataan tuntutan, sebagaimana yang dilakukan dalam rayuan semasa (lihat ms 564B, F–G); *Natesan v Goh Gok Hoon* [1968] 2 MLJ 3 diikuti.
- B** (8) Walaupun kes Mahkamah Rayuan *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 yang menjelaskan potongan $\frac{1}{3}$ ke atas ganti rugi untuk kehilangan penyara, adalah masih terikat ke atas Mahkamah Tinggi berdasarkan doktrin stare decisis, namun begitu, oleh kerana potongan $\frac{1}{3}$ adalah berdasarkan budi bicara berdasarkan keterangan tersebut, Mahkamah Tinggi mempunyai pilihan antara *Takong Tabari* dan keputusan panel lain di Mahkamah Rayuan dalam *Tan Phaik See (Ibu kepada Tan Hock San (si mati)) dan Tan Cheng Gek (Ibu Kepada Ng Chin Chai (si mati)) lwn Chuah Seng Boon* Civil Appeal No P04–14 of 1996 di mana Mahkamah Rayuan tidak membuat potongan $\frac{1}{3}$ tetapi telah memutuskan satu pengganda untuk 16 tahun. Dalam kes semasa, Mahkamah Tinggi bebas untuk mengikut keputusan Mahkamah Rayuan dalam *Tan Phaik See* dan sewajarnya, potongan $\frac{1}{3}$ ke atas ganti rugi untuk kehilangan penyara tidak dibuat (lihat ms 569E–H); *Tan Phaik See (Ibu kepada Tan Hock San (si mati)) dan Tan Cheng Gek (Ibu Kepada Ng Chin Chai (si mati)) lwn Chuah Seng Boon* Civil Appeal No P04–14 of 1996 diikuti.
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- (9) Plaintiff pertama telah menyatakan dalam keterangan beliau bahawa si mati bekerja sambilan selepas waktu sekolah antara 3pm–6pm dan keterangan beliau disokong oleh majikan si mati. Oleh itu, ia tidak boleh dipertikaikan bahawa si mati memang bekerja pada masa kematiannya. Justeru itu, jumlah RM75 sebulan selama sepuluh tahun yang berjumlah RM7,800 sebagai kehilangan penyara, RM10,000 untuk kematian dan sejumlah RM2,000 sebagai belanja pengebumian telah diawardkan kepada plaintiff pertama. Bagaimanapun, memandangkan si mati juga menyumbang kepada kemalangan tersebut, ganti rugi tersebut dikurangkan sehingga 50% dalam kecuaiian sertaan terhadap si mati (lihat ms 574H–575A, D, 576A).]
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Notes

- H** For cases on causation, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 720–732.
- For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 743–786.
- For cases on damages for fatal accidents, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 3268–3304.
- I** For cases on road accidents due to negligence, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 430–464.

For cases on the agreed bundles of documentary evidence, see 7(1) *A*
Mallal's Digest (4th Ed, 2003 Reissue) paras 1057–1066.

Cases referred to

- Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 (refd) **B**
Balachandran s/o Samy & Anor v Chew Man Chan & Anor [1995] 4 MLJ 685 (refd)
Benmax v Austin Motor Co Ltd [1955] AC 370 (refd)
Blay Pollard And Morris [1930] 1 KB 628 (refd)
Borneo Co (M) Sdn Bhd v Penang Port Commission [1975] 2 MLJ 204 (refd) **C**
Burns v Devon's Iron Works Ltd [1961] SC 102 (refd)
Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152 (refd)
Chan Chin Min & Anor v Lim Yok Eng (Lawful Mother of Gan Swee Hock, deceased) [1994] 3 CLJ 687 (refd)
Chih Lim Neo v Sit Hoon Neoh (1889) 4 KY 492 (refd) **D**
Chin Hooi Nan v Comprehensive Auto Restoration Service Sdn Bhd & Anor [1995] 2 MLJ 100 (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (refd)
Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34 (refd) **E**
Chung Hua Ying v Phang Mun Mooi & Anor [1987] 2 MLJ 693 (refd)
Development & Commercial Bank Bhd v Num Tjuan Sdn Bhd [1989] 1 MLJ 47 (refd)
English v Emery Reimbold & Strick Ltd Dj & Winthers (Farms) Ltd v Ambic Equipment Ltd, Verrechia (trading as Freight Master Commercials) v Commissioner of Police of the Metropolis [2003] 3 All ER 385 (refd) **F**
Farrel v Secretary Of State For Defence [1980] 1 All ER 166 (refd)
Goh Ya Tian v Tan Song Gou & Ors [1981] 2 MLJ 317 (refd)
Govinda Raju & Anor v Laws [1966] 1 MLJ 188 (refd) **G**
Guthrie Sdn Bhd v Trans-malaysian Leasing Corp Bhd [1991] 1 MLJ 33 (refd)
Haji Mohamed Dom v Sakiman [1956] MLJ.4 (refd)
Haron v Macaulay [1969] 1 MLJ 169 (refd)
Henry Trading Co Ltd v Harun [1966] 2 MLJ 281 (refd) **H**
How Paik Too v Mohideen [1968] 1 MLJ 51 (refd)
Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Johara Bi binti Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139 (refd) **I**
Jones v Great Western Railway Company Vol 144 LT 194 (refd)

- A** *Kanan all Subramaniam & Anor v Aman Syah bin Abadzyuid* [2001] MLJU 630; [2002] 6 CLJ 34 (refd)
Kayat & Anor v Lim Yew Seng [1972] 1 MLJ 26 (refd)
Koh Siak Poo v Sayang Plantation Bhd [2002] 1 MLJ 65 (refd)
Lee Soh Hua v Kow Lup Piow & Ors [1984] 2 MLJ 101 (refd)
- B** *Lim Chai Oon & Anor v Normah bte Ismail & Anor* [1994] 3 MLJ 105 (refd)
Lofthouse v Leicester Corporation The Times Law Reports 1948 Vol lxiv (refd)
London Passenger Transport Board v Upson [1949] AC 155 (refd)
Ma Clyde v Wong Ah Mei & Anor [1972] 2 MLJ 183 (refd)
- C** *Maimunah bte Hassan, Administratrix of the Estate of Rozita bte Khamis, deceased & Anor v Marimuthu & Anor* [1993] 1 CLJ 119 (refd)
Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99 (refd)
Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor [1998] MLJU 382; [1999] 1 CLJ 601 (refd)
- D** *Manager, Tuborg (Malaysia) Sdn Bhd v PP* [1990] 2 MLJ 173 (refd)
Mohd Samsudin Ismail v Tan Yeow Hwa & Anor [2000] 7 MLJ 24 (refd)
Natesan v Goh Gok Hoon [1968] 2 MLJ 3 (folld)
Neo Chan Eng v Koh Yong Hoe [1960] MLJ 291 (refd)
- E** *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 (refd)
Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30 (refd)
Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor [1993] MLJU 10; [1993] 4 CLJ 291 (refd)
Rubaidah bte Dirin (Suing as widow of Basia bin Bahari, deceased, on behalf of herself and the dependants of the deceased) v Ahmad bin Ariffin [1977] 1 MLJ 677 (refd)
- F** *S Singaram v Fong Peck Moi & Anor* [1976] 1 MLJ 237 (refd)
Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71 (refd)
- G** *Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal* [1996] 1 MLJ 576 (refd)
Siti Ajar Mat Zain v Cindy Teoh & Anor [1997] 2 CLJ Supp 282 (refd)
Siti Rahmah bte Ibrahim v Marappan & Anor [1989] 1 CLJ 252 (refd)
- H** *Sivalingam Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (refd)
State Government of Perak v Muniandy [1986] 1 MLJ 490 (refd)
Sundram v Arujunan & Anor [1994] 3 MLJ 361 (refd)
Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512 (refd)
Tan Phaik See (Ibu kepada Tan Hock San (si mati)) dan Tan Cheng Gek (Ibu Kepada Ng Chin Chai (si mati)) lwn Chuah Seng Boon Civil Appeal No P04-14 of 1996 (folld)
- I** *Tan Song Gou v Goh Ya Tian* [1983] 1 MLJ 60 (refd)

- Tay Ah Kow @ Tee Cha & Anor v Chua Hee Teng & Anor* [1984] 2 CLJ 304 (refd) **A**
- Teah Cheng Gaw v Elias Bin Abdul Ghani* Civil Appeal No R2-12-118 of 1997 (refd)
- Ting Jie Hoo v Lian Soon Hing Shipping Co* [1990] 2 MLJ 56 (refd)
- Tu Kon Lin and Too Kow Hing v Veronica Joseph (f), an infant and Pamela Joseph (f), an infant and Anor* Supreme Court Civil Appeal No 332 of 1986 (refd) **B**
- Veronica Joseph (F), an infant and Anor v Tu Kon Lin and Anor* [1987] 1 CLJ 81 (refd)
- Wilsler v Essex Area Health Authority* [1988] 1 All ER 871 (refd)
- Wisma Punca Emas Sdn Bhd v DR Donal R O'Holohan* [1987] 1 MLJ 393 (refd) **C**
- Woon Ngee Yew & Ors v Ng Yoon Thai & Ors* [1941] MLJ 37 (refd)
- Yew Lean Finance Development (M) Sdn Bhd v Tan Gin Thong* [1985] 1 CLJ 299 (refd) **D**
- Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 (refd)
- Yew You & Anor v Mah Poay Koh & Anor* [1970] 1 MLJ 57 (refd)

Legislation referred to

- Civil Law Act 1956 ss 7(3)(iv)(d), (8), (11), 12(4), 28A(2)(d) **E**
- Evidence Act 1950 ss 35, 58, 74

Daljit Singh (Gurdev Daljit & Su) for the appellants.

Thomas Su Keong Siong (CK Leong & Co) for the respondents.

VT Singham J: This is an appeal by the first appellant against the decision of the Magistrate's Court, Taiping which had dismissed his claim on 15 December 2000 for damages, being a dependency claim against the respondents arising out of a road accident on 10 July 96. The appeal is against the whole of the said decision. On its own facts, this is a simple and ordinary running down case and it is not necessary for a lengthy judgment. However, the pleadings and the reasoning of the learned magistrate is so unsatisfactory perhaps discussion with a view to remind or clarify certain legal issues which are relevant to this appeal is justified. The first appellant and the second respondent will be referred to as the first plaintiff and the second defendant respectively in this grounds of decision. **F**

G

H

Statement of claim

By the statement of claim, the first plaintiff as the father of Punithamoorthi a/l Muniyandi, deceased filed this claim under s 7 of the Civil Law Act 1956 being a dependency claim for loss of support. By para 3 of the statement of claim, the first plaintiff has pleaded as follows: **I**

- A** Pada 10 haribulan Julai 1996 lebih kurang jam 8.00 malam simati (Punithamoorthi a/l Muniyandi) sedang memandu sedang menunggang motorsikal bernombor pendaftaran ACQ 789 dan plaintiff kedua pula sedang menunggang basikalnya di sepanjang jalanraya dari arah Pantai Remis ke arah Taiping apabila pada atau dekat di jalan tersebut, sebuah motokar yang bernombor pendaftaran WCC 2112 yang dipandu oleh defendan kedua sebagai pekerja/agen kepada defendan pertama telah berlanggar dengan motorsikal kepunyaan simati dari arah belakang dan mengakibatkan pelanggaran dengan basikal kepunyaan plaintiff kedua.
- B**

However, during the course of the trial and after the first plaintiff's case has been closed, there was an oral application on behalf of both the first plaintiff and the defendants to amend their respective statement of claim and defence. The learned magistrate allowed the amendments which read as follows:

- C**
- Pemohonan lisan merujuk pada mukasurat 1 **Penyata Tuntutan** perenggan 3, barisan ketiga — 'dari arah belakang' selepas ada dan/atau melanggar Punithamoorthi a/l Muniyandi (Simati) yang pada masa itu terbaring atas jalan.
- D**

Mukasurat 3 — butir-butir gantirugi khas

Hujah atas item 'a' — item 'b' hingga 'e' tarik balik.

Liability, funeral dependency

- E** **Penyata Pembelaan**
P2 —

'Simati dan' kemudian tambah *atau* potong juga.

Plaintif — tiada bantahan.

Mahkamah: Benarkan pindaan.

- F** By the amendments to the statement of claim, it would appear that the facts as to how the accident occurred between the deceased and the second defendant's motorcar seemed to have pleaded the true position of how the accident occurred, being the second defendant's motorcar collided into the deceased while the deceased was lying on the road after the first collision between the second plaintiff's bicycle and the deceased.

- G** By para 4 of the statement of claim, the first plaintiff had particularized the negligence against the second defendant-driver as follows:

Butir-butir kecuaiian defendan kedua

- (a) Memandu dengan terlalu laju dalam keadaan tersebut;
- H** (b) Gagal memerhati/atau memberi sebarang perhatian yang baik atau memperhatikan kehadiran pihak simati dan plaintiff;
- (c) Memandu terlalu dekat dengan pinggir jalanraya;
- (d) Memandu di laluan jalanraya yang salah;
- (e) Gagal memberikan sebarang amaran/atau amaran yang mencukupi tentang kedatangannya;
- I** (f) Gagal menggunakan breknya pada masa yang tepat dan atau langsung tidak menggunakannya atau mengurangkan kelajuannya atau dengan apa

jua cara mengendali atau mengawal kenderaan bagi mengelakkan kemalangan tersebut; **A**

(g) Gagal memerhatikan pihak simati dan plaintif pada masa yang tepat atau sesuai bagi mengelakkan kemalangan tersebut;

(h) Memasuki atau melintasi laluan pihak simati dan plaintif;

(i) Gagal menunggu sehingga pihak simati dan plaintif lalu dengan selamatnya sebelum melintas laluan pihak plaintif dan simati; **B**

(j) Memasuki laluan sah dan betul pihak simati dan plaintif;

(k) Gagal mematuhi peruntukkan-peruntukkan Akta Jalan raya;

(l) Memotong kenderaan di hadapan bila keadaan tidak sesuai atau selamat; **C**

(m) Tergesil pihak simati dan plaintif;

(n) Melanggar pihak simati dan plaintif dari belakang.

The plaintiff has also pleaded the doctrine of *res ipsa loquitur*.

By para 6 of the statement of claim, the first plaintiff has alleged that as a result of the matters aforesaid the deceased suffered serious injuries and died. **D**

Statement of defence

By para 1 of the statement of defence, the defendants have pleaded no knowledge and denied the contents of all the paragraphs as pleaded in the statement of claim and asked the plaintiff for strict proof. By para 2 of the statement of defence, the second defendant has denied being involved in the said accident. The second defendant has also stressed that if he is involved which he has denied, the accident was solely caused/contributed by or in the alternative due to the negligence of Punithamoorthi a/l Muniyandi, deceased and/or the negligence of the second plaintiff. **E**

The defendants have particularized the negligence against the deceased as follows:

Butir-butir kecuaiian penunggang motorsikal ACQ 789, Punithamoorthi a/l Muniyandi, si mati: **G**

(a) Gagal meneliti dan/atau melihat keadaan jalan dan lalulintas dengan sewajarnya disepanjang jalanraya tersebut;

(b) *Menunggang motorsikal No ACQ 789 pada tahap kelajuan yang berlebihan dan membahayakan dirinya sendiri;*

(c) *Gagal mengambil apa-apa langkah mengelak atau bertindak menghindarkan kemalangan tersebut;* **H**

(d) *Gagal menggunakan bereknya dalam masa yang cukup bagi mengelakkan kemalangan tersebut;*

(e) *Gagal memperlahan, berhenti, menyimpang atau apa-apa cara mengendalikan motorsikal ACQ 789 supaya dapat mengelakkan kemalangan tersebut;* **I**

(f) *Menunggang motorsikal No ACQ 789 dengan gopoh dan meluhi;*

- A (g) Meletakkan defendan kedua dalam keadaan cemas yang mana menyebabkan defendan Kedua mustahil untuk mengelakkan kemalangan tersebut;
- (h) Mengwujudkan situasi yang merbahaya yang mengakibatkan mustahil bagi defendan Kedua untuk mengelakkan kemalangan tersebut;
- B (i) *Gagal mengambil perhatian terhadap kod Lebuhraya dan Kaedah-Kaedah Lalulintas.* (Emphasis added.)

The defendants have also particularized the negligence against the second plaintiff-cyclist as follows:

Butir-butir kecuaiian plaintif kedua, penunggang basikal

- C (a) Gagal meneliti dan/atau melihat keadaan jalan dan lalulintas dengan sewajarnya disepanjang jalanraya tersebut;
- (b) Menunggang basikal dengan cara merbahaya;
- (c) Gagal memberi perhatian terhadap kehadiran dan/atau kedatangan lain-lain kenderaan di atas jalanraya tersebut;
- D (d) Menunggang basikal di laluan yang salah;
- (e) Gagal untuk mengawal basikalnya dengan sempurna;
- (f) Gagal mengambil apa-apa langkah mengelak atau bertindak menghindarkan kemalangan tersebut;
- E (g) Gagal menggunakan bereknya dalam masa yang cukup bagi mengelakkan kemalangan tersebut;
- (h) Gagal memperlahan, berhenti, menyimpang atau apa-apa cara mengendalikan basikal supaya dapat mengelakkan kemalangan tersebut;
- (i) Menunggang basikal dengan gopoh dan melulu;
- F (j) Gagal mengambil perhatian terhadap Kod Lebuhraya dan Kaedah-Kaedah Lalulintas.

The defendants have also pleaded no knowledge and denied the allegations and the particulars of the injuries of the second plaintiff and the special damages as pleaded in the statement of claim and asked for strict proof. The defendants have applied for the plaintiffs' claim to be dismissed with costs.

Police report of the second plaintiff-cyclist

By his police report which was lodged on 8 August 1996 at 3.30pm and marked as exh (P6), the second plaintiff-cyclist has stated as follows:

Pada 10 Julai 1996 jam lebih kurang 7.30 petang saya berbasikal dari kilang di Termelok hendak balik ke rumah saya. Semasa saya dalam perjalanan itu lebih kurang KM 29 Jalan Taiping-Pantai Remis tiba-tiba basikal saya dilanggar oleh motorsikal dan lepas itu saya terpelanting ke tepi hutan di situ. Saya telah dihantar oleh kawan saya balik ke rumah. Kemudian mereka bawa saya ke kilang tempat saya bekerja dan lepas itu saya dihantar ke Klinik Trong. Selepas itu saya di hantar ke Hospital Taiping. Saya mendapat kecederaan di bahagian kepala. Basikal saya rosak teruk. Kerugian belum tahu.

*Police report of the second defendant***A**

By his police report which was lodged on 10 July 96 at 8.25pm and marked as exh D1, the second defendant has stated as follows:

Pada 10 Julai 96 jam lebih kurang 7.15 petang saya berlepas daripada Pantai Remis mahu pergi ke Taiping dengan memandu motokar No: WCC 2112 bersama tiga orang kawan. Pada 10 Julai 96 jam lebih kurang 8.05 malam apabila saya sampai di km berapa tidak tahu Jalan Pantai Remis Taiping, nampak beberapa orang berkumpul di tepi jalan dalam keadaan gelap, masa itu saya ternampak satu benda di tengah jalan, oleh kerana keadaan terlalu dekat saya tidak dapat mengelak motokar saya dan terus mengheret benda tersebut lebih kurang 10 kaki dan kemudian saya berhenti dan turun periksa dapati benda tersebut merupakan mayat manusia.

B**C**

For the purpose of determining liability in the instant appeal, the relevant oral evidence is that of the investigating officer, PW1 and the second defendant. The relevant documentary evidence are the two police reports, the sketch plan with key, the police photographs, the death certificate and the postmortem report. The police report No:2034/96 lodged by Selvaraja a/l Azamalar, the brother-in-law of the deceased which was included in the record of appeal is excluded because it is not an agreed document and neither was it marked as an exhibit and ought not to have been included. This report has also not been referred to by the learned magistrate. In any event, this court did not take this police report into consideration as part of the evidence as it ought to be disregarded and excluded from the record of appeal as it would tantamount to misleading this court.

D**E**

Upon hearing both the counsels for the first plaintiff and the defendants, reading the record of appeal together with all the relevant and admissible documents and submissions together with the authorities, this court allowed the first plaintiff's appeal, set aside the decision of the learned magistrate who had dismissed the first plaintiff's claim and apportioned liability equally between the deceased and the second defendant on a 50:50 basis.

F

In the instant appeal, basically there are three issues:

G

- (a) causation;
- (b) negligence; and
- (c) consequently, whether the first plaintiff has proved his claim against the second defendant on the balance of probabilities and damages.

H

The learned magistrate in her grounds of judgment which although has three pages, the grounds to dismiss the first plaintiff's claim is only contained in one page. Her reasons for dismissing the first plaintiff's claim is briefly as follows:

I

firstly, the accident occurred at 7.30pm and the second defendant arrived at the place of accident at 8.05pm;

- A secondly, there were people gathered at the place of accident and if the deceased was alive at the time when the first defendant's motorcar collided into him, it is *more possible* that the people who were gathered at the area would have given assistance; and
- thirdly, the plaintiff did not produce evidence to show the time when the accident actually occurred.
- B Consequently, she held that she accepted the evidence of the investigating officer that the accident occurred at 7.30pm and the second defendant's version that he reached the place of accident only at 8.05pm because according to the learned magistrate if the deceased was alive, people who had gathered at the area would have given assistance.
- C *Submissions on behalf of the first plaintiff at the High Court*
- In addition to the written outline submissions, learned counsel for the first plaintiff submitted as follows:
- D (a) The learned magistrate should have given her views on the people who were standing — were they by-standers or should have addressed her mind to that — she failed to address her mind to the time of death of the deceased. With the short reasoning, she dismissed the plaintiffs' claim.
- E (b) He also referred to the copy of the death certificate which was marked as exh (P3) and he submitted that this was unconditionally agreed as an agreed document by the defendants' solicitors as to the date, time and place of death and this gives an irresistible conclusion that the deceased died on his way to the clinic at 8.25pm.
- F (c) He also referred to the report of the postmortem examination dated 27 September 96 issued by the Medical Officer, Hospital Taiping which was an agreed document and marked as exh (P4), particularly to the injuries under the external examination. He submitted that the nature of the injuries shows that the second defendant's motorcar collided into the deceased when the deceased was lying on the road.
- G (d) The initial accident was between the second plaintiff's bicycle and the deceased's motorcycle — these are objective facts — injuries and time is there and these are all objective facts.
- (e) He referred to the sketch plan with key which is marked as exh (P1) and (P1K), namely to the scratch marks at G (G1–G2). He submitted that this would have been caused as a result of the second defendant's motorcar dragging the deceased and that point 'G' was the initial accident. He referred to the case of *Tay Ah Kow @ Tee Cha & Anor v Chua Hee Teng & Anor* [1984] 2 CLJ 304.
- H
- I (f) He submitted that the death certificate exh (P3) and the postmortem report exh (P4) shows the nexus as to the death of the deceased. He referred to the case of *Sundram v Arujunan & Anor* [1994] 3 MLJ 361.

- (g) He submitted that the cause of death and the time of death have been agreed by the defendants' solicitors and they cannot now raise the issue of who caused the death. He submitted that the defendants should have specifically pleaded that the death was not caused by the second defendant. From these facts, there can be a reasonable inference drawn that the cause of death was due to the second defendant's motorcar going over the deceased. A
B

Causation

- (h) He submitted that the chain of causation between the crush injuries and the subsequent death is clear. He submitted that therefore the cause of death on the balance of probabilities was due to the collision with the second defendant's motorcar. C
- (i) He submitted that if the death was caused by the second defendant, then the issue of negligence is raised. In normal situations, it would be on a 50:50 basis. However, on the facts in this case, he submitted that the second defendant should be held 70% liable and 30% contributory negligence should be attributed to the deceased-rider for the following reasons: D
- (i) Under cross-examination, the second defendant had admitted that if he had applied his brakes much earlier, he would not have collided into the deceased. Also, the second defendant had admitted that if he had paid attention, the accident could have been avoided. E
- (ii) Under cross-examination, the second defendant had further admitted that if there was no vehicle coming from the opposite direction, if he had applied the brakes, he would have avoided the said accident. F
- (j) He referred to the evidence and the admission of the second defendant under cross-examination by the first plaintiff's counsel which admission is as follows: G
- Saya setuju sebelum langgar benda di atas jalan, tidak tahu masih hidup atau meninggal. Setuju jika brek lebih awal tidak akan melanggar benda itu. Setuju jika berhati-hati sedikit akan dapat elak kemalangan.
- (k) Under re-examination, the second defendant testified as follows: H
- Bila saya nampak kumpulan orang ditepi jalan, saya beri perhatian pada kumpulan orang itu. Selepas nampak kumpulan orang, saya perlahan kereta sedikit lagi. Jika tidak ada kenderaan datang dari depan, jika saya dapat menekan brek, saya akan dapat mengelakkan kemalangan tersebut.
- (l) He submitted that therefore the second defendant should be found more culpable and that he was foolish to proceed. He referred to the case of *Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor* [1993] MLJU 10; [1993] 4 CLJ 291 at held three of the CLJ report and to a passage referred to in that judgment where Lord I

A Uthwatt in *London Passenger Transport Board v Upson* [1949] AC 155 has stated as follows:

A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form these follies commonly take.

B *Quantum*

(a) The plaintiff's counsel submitted a sum of RM120 per month for ten years. However, he said that it is at the discretion of the court to award the appropriate amount. He referred to the case of *Sui Ajar Mat Zain v Cindy Teoh & Anor* [1997] 2 CLJ Supp 282 at held [2a] at p 283 where his Lordship Abdul Hamid Mohamad J (as he then was) distinguished between loss of earnings and loss of support and said:

D Although s 7(3)(iv)(d) of the Act appeared to be mandatory, the instant court was bound to follow the majority decision of the Supreme Court in *Chan Chin Min & Anor v Lim Yok Eng* which held that in a claim for loss of support by a parent of a deceased, the court was not bound to apply the multiplier stipulated in s 7(3)(iv)(d) of the Act but should take into consideration the fact that the deceased might get married later had he lived and, as a result, his contribution to the parent might diminish or cease. (Emphasis added.)

E (b) He submitted that the age of the deceased and the parents have to be considered.

Loss of support

F As for loss of support, a sum of RM14,000 based on RM120 per month for ten years, RM10,000 for bereavement and RM2,000 as funeral expenses totalling RM26,000 was proposed towards both general and special damages.

G The first plaintiff's counsel limited the claim to RM25,000 on 100% liability to bring it within the jurisdiction of the magistrates' court. He therefore submitted that the appeal should be allowed with costs.

Submissions on behalf of the defendants at the High Court

On the other hand, the defendants' counsel submitted as follows:

H (a) He referred to the statement of defence and particularly to para 4 which states:

Kedua-dua defendan tidak mengetahui dan tidak mengakui kandungan, dakwaan dan tuntutan yang terkandung didalam butir-butir kecederaan plaintiff dan juga butir-butir gantirugi khas seperti yang dinyatakan didalam Pernyataan Tuntutan. Plaintiff adalah dikehendaki untuk membuktikannya.

I (b) The case of *Sundram v Arujunan & Anor* which was referred by the first plaintiff's counsel could be distinguished as to causation of the

injuries. As to the death certificate exh P3, he submitted that if it was received as evidence to prove the death of the deceased and based on the death certificate, it would also raise the issue that the deceased was a student. A

(c) He referred to the sketch plan as exh P1 and prepared by PW1 the investigating officer — the finding by the learned magistrate that there were people around is reasonable. B

(d) He referred to the grounds of judgment of the learned magistrate and submitted that if this court finds that the cause of death was due to the accident between the second defendant's motorcar and the deceased, the liability of negligence should be more on the deceased because: C

(i) it was a second accident;

(ii) it was dark;

(iii) damage to the deceased's motorcycle and the bicycle can only mean that the deceased had collided the rear of the second plaintiff's bicycle. D

(e) He referred to the damages to the motorcycle as testified by PW1, the investigating officer which states as follows:

(i) penghadang angin

(f) He also referred to the evidence of the second defendant to a question by the learned magistrate which is: E

Mahkamah:	Jarak kali pertama nampak benda itu?	
Jawapan:	13 kaki	
	Kedaaan — barang atas tanah tidak nampak kerana gelap.	F

(g) He submitted that the accident happened in the agony of the moment. He further submitted that the second defendant was not challenged as to whether he took any evasive action.

(h) As to liability, he submitted for 30% against the second defendant and referred to the case of *Govinda Raju & Anor v Laws* [1966] 1 MLJ 188. G

Quantum

As to quantum, the defendants' counsel submitted as follows: H

(i) the sum of RM120 per month for loss of support is on the high side and proposed a sum of RM50 per month as reasonable for seven years;

(ii) as to the $\frac{1}{3}$ deduction as held in *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 — he leaves it to this court; I

- A (iii) as for bereavement — he agrees to RM10,000;
(iv) as for funeral expenses — he agrees to RM2,000.

The second defendant's counsel submitted that the appeal should be dismissed or alternatively, negligence should not be for more than 30% against the second defendant.

B

Reply by plaintiff's counsel

- (a) evasive action taken by the second defendant was too late;
(b) the second defendant should have applied brakes — an unreasonable reaction compared to the danger present.
- C

Decision of this court

- D On the materials and the admissible evidence before this court as contained in the record of appeal, the only reasonable inference this court can draw is that the deceased must have died after the second defendant's motorcar collided into him. The learned magistrate with respect did not make a finding on the material facts and evidence before the court and neither did she sufficiently consider the documentary evidence which was agreed to without any qualification and marked as exhibits. Her decision as a whole cannot in the respectful view of this court be considered as a speaking judgment. As stated above, although there are three-pages for the grounds of judgment, her reasons for dismissing the first plaintiff's claim is contained only in one page which reads as follows:
- E

Alasan Keputusan

- F Di atasimbangan kebarangkalian plaintiff telah gagal membuktikan kesnya. Defendan di dalam kes ini telah katakan bahawa beliau telah nampak beberapa orang berkumpul di tepi jalan sebelum keretanya terlanggar dengan si mati.

- G Keterangan SP1 (pegawai penyiasat) juga menyokong keterangan defendan. Menurut beliau kejadian berlaku pada pukul 7.30 malam. Defendan hanya sampai di tempat kejadian itu pada pukul 8.05 minit malam. Selama 30 minit adalah munasabah telah ada orang berkumpul di tempat kemalangan tersebut dan menghulurkan bantuan.

- H Mahkamah menerima hujahan defendan bahawa versi defendan adalah lebih berkemungkinan kerana jikalau simati masih hidup pada masa itu, orang yang berkumpul di kawasan itu sudah tentu memberikan pertolongan.

Plaintif juga telah tidak mengemukakan keterangan tentang bilakah masa sebenar kemalangan berlaku yang demikian keterangan pegawai penyiasat dan defendan adalah diterima.

- I The reasoning of the learned magistrate for accepting the second defendant's version as more possible is because she held that if the deceased was alive at the time when the second defendant's motorcar collided into him, the people who had gathered at the area would have rendered

assistance. It is the view of this court that the reasoning of the learned magistrate was not based on the evidence but purely on speculation and conjecture and without any legal basis and this speculation could go on ad infinitum. In *Jones v Great Western Railway Company* Vol 144 LT 194, Lord Macmillan (read by Lord Thankerton) in a dissenting judgment observe that:

Injustice is as likely to be done as justice by reliance on general consideration of probability, for it is proverbial that it is the unexpected that always happens, and the only safe course is to go by the evidence.

There is no evidence for how long the people had gathered at the scene or whether they had arrived shortly before the second defendant's motorcar had collided into the deceased. There is no evidence as to the number of persons who were at the scene when the first collision between the deceased's motorcycle and the second plaintiff's bicycle occurred and the number of persons who subsequently came after the second collision between the deceased and the second defendant's motorcar. The learned magistrate should not have embarked upon a course of speculation or hypothesis as to what might in fact have happened if the deceased was alive but on the totality of both oral and documentary evidence. The conjecture by the learned magistrate or the assumption was unwarranted because the matters referred to and relied on by her are surmised rather than inference and cannot be sustained. In *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at p 168 Lord Wright said:

Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

The learned magistrate did not consider or give any weight to the documentary evidence aforesaid where she has stated that the plaintiff did not adduce evidence when the accident actually occurred. In fact, in his police report, the second defendant has expressly stated that he arrived at the place of accident on 10 July 96 at about 8.05pm and that he dragged the deceased for about ten feet. The evidence as to the time when the accident occurred between the second defendant and the deceased was no longer an issue and need not necessarily be adduced on behalf of the first plaintiff where there is already an admission by the second defendant in his police report exh (D1) which forms part of his evidence states that he collided into the deceased at about 8.05pm whereas the postmortem report states that the deceased died at 8.25 pm on his way to the clinic at Trong. The learned magistrate ought to have determined the issue of causation on the totality of the evidence which would include admissions made by the second defendant in his evidence and not solely on the evidence adduced on behalf

- A of the first plaintiff. In *Neo Chan Eng v Koh Yong Hoe* [1960] MLJ 291, his Lordship Neal J said at p 292:

B The onus of proving negligence on the part of the defendant was on the plaintiff, and the plaintiff failed to discharge the onus either by her own evidence or by cross-examination of the defendant or *by admissions made by the defendant*. I am therefore forced with regret to dismiss her claim. I have said 'with regret' because I feel that had the plaintiff given the correct version, whilst she may have been found guilty of contributory negligence, she might have succeeded to some extent. (Emphasis added.)

- C In *Yew You & Anor v Mah Poay Koh & Anor* [1970] 1 MLJ 57 at p 59, his Lordship Ong Hock Thye CJ (Malaya) said:

D ... It is elementary law that the onus on the plaintiffs is satisfactorily discharged once it appears to the court on balance of probabilities that the circumstances are more consistent than not with the defendants' negligence. Evidence in support of the plaintiffs' case is not necessarily confined to what is adduced on their behalf, but the whole of the evidence, from whatever source, must also be taken into consideration.

E ... the plaintiffs were compelled to rely mainly on the mute testimony of the sketch plan and photographs, together with the observations of the investigating officer as the foundation of their case. They could also avail themselves of admissions by the defence. A fact, not to be lost sight of is that only the self-serving evidence of the lorry driver and his mate tells us where the injured man was lying on the road before they removed him. There were no eye-witnesses. The possibility, therefore, cannot be ruled out that, if the lorry driver was at fault, his foremost concern would be to do what he could to exculpate himself. The evidence presented by the defendants ought, therefore, to be scrutinised carefully, if not with some suspicion, since they had no fear of contradiction by a dead man.' (see s 6, 7 and 9 of the Evidence Act 1950, *Tong Khing Kia & Anor v Yeo Kong Boon* [1991] 2 MLJ 101 and *Anamaly Mayivin Lwon Lim Ah Leak & Yang Lain & Satu Rayuan Lagi* [2002] 2 CLJ 710 at pp 731-734 which was followed by this court)

Causation

- G It is settled law that the onus is on the first plaintiff to establish that 'there is a causative link' between the deceased's death and the negligent act of the second defendant (see *Wilsler v Essex Area Health Authority* [1988] 1 All ER 871). However, In the instant appeal, having regard to the contents of the death certificate, exh (P3) as being an agreed document, considering the
- H evidence of the second defendant which includes his police report exh (D1) and the cause of death as found by the medical officer in his postmortem report exh (P4), there is sufficient evidence to indicate that the collision between the second defendant's motorcar and the deceased occurred at/about 8.05pm and the deceased died at/about 8.25pm after the second defendant's motorcar collided into the deceased and while the deceased was
- I on his way to a clinic at Trong. At this stage, it is important to observe that if the deceased was already dead before the second defendant's motorcar collided into him and dragged the deceased, there was no necessity to take

the deceased to a clinic as stated in the death certificate. The evidence shows that the deceased who was taken to a clinic was subsequently admitted into the hospital at Taiping where the postmortem was carried out after his death. Therefore, it cannot be disputed that the deceased was taken from the place of accident to the clinic at Trong when he was alive but he did not reach the clinic as he must have died on the way to the clinic at Trong as stated in the death certificate. Subsequently, on admission into the hospital at Taiping, the postmortem was carried out. The sequence of events no doubt indicate that the deceased was initially taken to the clinic at Trong for treatment but however when he died on the way, he was then taken to the hospital at Taiping for post-mortem.

Based on the totality of the evidence, the only reasonable inference that could be drawn is that the deceased must have been alive when the second defendant's motorcar collided into him and dragged him for a distance of ten feet and he died on the way to the clinic at Trong. This inference can further be supported by the postmortem report which states as follows:

Under cause of death 'multiple crush injuries with fracture dislocation of cervical vertebrae C2 C1 due to motor vehicle accident.

This court is of the view that the multiple crush injuries which caused the death must have been attributed by the second defendant's motorcar which went over the deceased. Consequently, by agreeing to the death certificate exh (P3) which contains the time of death as 8.25pm on 10 July 96 and the place of death as 'Dalam perjalanan ke Klinik Trong' and the postmortem report exh (P4) which contains the cause of death, the defendants have no doubt admitted the contents as true and cannot at present be allowed to resile or retract from those admissions to the detriment of the first plaintiff's claim against the second defendant as if the same are issues which have been disputed and not proved.

Agreed bundle of documents

In the instant appeal, the defendants were aware that the death certificate was in the agreed bundle of documents and tendered in court as evidence and marked as exh (P3) which was indeed was a relevant and admitted document and the defendants cannot now be permitted to approbate and reprobate at the same time. In fact it was open to the defendants to disagree to have the death certificate included in the agreed bundle of documents further, could have challenged the contents of the documents, but they chose not to contest the same. In *Borneo Co (M) Sdn Bhd v Penang Port Commission* [1975] 2 MLJ 204, his Lordship Lee Hun Hoe CJ (Borneo) observed at p 205:

In the present case, respondent were aware of the documents in the agreed bundles. Unless objection was taken appellants should be allowed to use the documents provided they were relevant and admissible.

- A In *Henry Trading Co Ltd v Harun* [1966] 2 MLJ 281, his Lordship Wan Sulaiman J (as he then was) in delivering the judgment of the Federal Court said at p 282:

With respect, I say that where there is an agreed bundle of documents, there is no need to prove this documents. This rule is too well established in law to be doubted.

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(See *Maimunah bte Hassan, Administratrix of the Estate of Rozita bte Khamis, deceased & Anor v Marimuthu & Anor* [1993] 1 CLJ 119 at p 121.)

In *Guthrie Sdn Bhd v Trans-malaysian Leasing Corp Bhd* [1991] 1 MLJ 33 at p 35, his Lordship Hashim Yeop A Sani CJ (Malaya) said:

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... no evidence was adduced by the appellants in the court below to show that the documents tendered were forgeries. Indeed all these documents went into the agreed bundle of documents and no objection was raised at any stage of the proceeding.

D

It is settled law, at least in civil proceedings, that documents tendered and marked as exhibits as evidence through witnesses or makers are accepted as evidence on admission or agreement between the parties, particularly in running down cases. In the instant appeal, the death certificate was placed in the agreed bundle and marked as an exhibit during the trial without any objection by the defendants' counsel whereby the defendants elected not to contest that document. Accordingly, it necessarily becomes documentary evidence without reservation and the contents which have been admitted cannot thereafter be challenged, questioned or otherwise be raised as an issue during submissions. This mode of admitting documents as evidence as stated above without calling the maker have been acceptable in civil proceedings over the years particularly in running down cases and both

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counsel who are experienced in running down cases ought to be aware of the consequences of agreeing to documents and consenting them to being marked as exhibits (see s 58 of the Evidence Act 1950) (*Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at pp 706-707 and *Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor* [1998] MLJU 382; [1999] 1 CLJ 601 at pp 605-606).

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G In *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 at p 31, his Lordship Syed Agil Barakbah SCJ said:

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... The general rule is that all facts in issue and relevant facts must be proved by evidence. There are, however, two classes of facts which need not be proved, viz (a) facts judicially noticed and (b) facts admitted.

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In *Goh Ya Tian v Tan Song Gou & Ors* [1981] 2 MLJ 317 at p 319, his Lordship Lai Kew Chai J said:

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With respect again, no question of depriving anybody's right to cross-examine arises. It is all left to agreement between the parties. A party wishing to cross-examine the maker of a document should not agree to its inclusion in the Agreed Bundle or should where convenience dictates at least extract a written

undertaking from the other side that the maker would be produced at the trial for cross-examination. This is not to say that the party cannot cross-examine the maker of an agreed document if the maker chooses to give evidence nor that the party in agreeing to the inclusion of a document agrees with what the document purports to say or its evidential value. The party having agreed to the document is perfectly entitled to rebut or reduce the evidential or probative effect of the contents of the document by other evidence. What is clear is that the documents in the Agreed Bundle are admitted into evidence by consent without production of the maker or the originals and the contents do form part of the evidence before the court.

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In *Chin Hooi Nan v Comprehensive Auto Restoration Service Sdn Bhd & Anor* [1995] 2 MLJ 100 at p 104, her Ladyship Siti Norma Yaakob J (as her Ladyship then was) said:

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... Although the maker of the receipt was not called, this should not have prevented the magistrate from marking the receipt an exhibit, particularly when the appellant had produced a copy of his credit card receipt to support his claim that he did make such payment for the repairs to the car. Hence the costs of the repairs are allowed at RM3,630.85.

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(see *Yew Lean Finance Development (M) Sdn Bhd v Tan Gin Thong* [1985] 1 CLJ 299)

If the defendants were seriously disputing the time or when the deceased died it is only prudent that they should not have agreed to the contents of the death certificate. Alternatively, the defendants' counsel should have made it clear at the beginning of the trial that it was a conditional agreement to the effect that it is agreed subject to cross-examination of the maker or it is agreed without prejudice to the right of the defendant to challenge the time of death as stated in the death certificate. This conditional agreement would have put the plaintiff's solicitors on notice to consider whether further evidence was required on the issue as to the time of the death as stated in the death certificate. Unfortunately, these steps were not taken by learned counsel for the defendants. In fact, if the contents of the death certificate were disputed, the first plaintiff could have called the persons who took the deceased to the clinic at Trong to confirm that the deceased died on the way to the clinic, or call the maker of the death certificate to verify the source of the entries recorded. In *S Singaram v Fong Peck Moi & Anor* [1976] 1 MLJ 237, His Lordship Ibrahim J said at p 238:

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Furthermore I was of the view that defendant should not be permitted to blow hot and cold and have a second bite of the cake. In *Broom's Legal Maxims*, (10th Ed), at p 103 it is stated that:

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'He is not to be heard who alleges things contrary to each other.'

As defendant had previously maintained that he was not out of time he could not now be heard to the contrary and ask for some other remedy. The following passage from the judgment of Ong Hock Thye FJ (as he then was) in *Natesan v Goh Gok Hoon* [1968] 2 MLJ 3 at p 8 is illustrative of the above-stated maxim:

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- A 'Above everything else is the fact that the learned counsel for the appellant now sets up a case which not only is not founded upon, but contrary to, this appellant's own pleadings. We should be creating an absurd precedent to consider allowing this appeal, on any ground, without even any application for consequential amendment of the defence pleaded. Any amendment, at this stage, setting up a case which amounts to a volte-face, is naturally out of the question.' (Emphasis added.)
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In *Haron v Macaulay* [1969] 1 MLJ 169 at p 170, his Lordship MacIntyre FJ said:

- C ...However, it would appear from the notes recorded by the trial judge that the assessment was based on certain admissions made by counsel who then represented the appellant. We are therefore of the opinion that the appellant is bound by those admissions and that the question of quantum should be approached on the basis of those admissions.
- D In the circumstances, the defendants' counsel should not be allowed to dispute the contents of the death certificate which supports the first plaintiff's claim against the second defendant (see *Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor*). The defendants' counsel should be candid and not be allowed to submit on an afterthought to the contrary to this admission by challenging that causation has not been established. Any omission or inadvertence for or on behalf of the defendants must go against the defendants and not against the first plaintiff's claim.
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- F In the instant appeal, the learned magistrate seemed not to have considered the admission of the second defendant during cross-examination that prior to colliding into the deceased, he did not know whether the deceased was alive or dead and this was not disputed or clarified during re-examination. There is also an admission by the second defendant that the scene of the accident was dark and as he was too close when he saw the deceased, he could not avoid the accident and that the deceased was dragged for about ten feet. There was no evidence whether any of the people who had gathered at the scene had ever told the second defendant or PW1, the investigating officer that the deceased was already dead when the second defendant's motorcar collided into the deceased and dragged him for a distance of about ten feet. The fact that the second defendant had said that he saw a 'mayat' when he got down from his motorcar after colliding into the deceased does not in the view of this court tantamount to show that the deceased was already dead before the second defendant's motorcar collided into the deceased unless further evidence was elicited to clarify the word 'mayat'. This word 'mayat' must not be read in isolation but on the totality of evidence as the second defendant had admitted that before colliding into the deceased who was lying on the road, he did not know whether he was alive or dead.
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- I In the circumstances, this court is of the view that the evidence as contained in the death certificate being exh (P3) and the postmortem report exh P4 have on the balance of probabilities established causation and the

link leading to the deceased's death. Consequently, the burden is shifted to the defendants to displace, contradict or raise rebuttal evidence but they have failed to do so and are deemed to have accepted the evidence. Therefore, there was no necessity for the plaintiff to prove what had already been agreed and admitted as evidence. Since the deceased cannot contradict any evidence put forward by the second defendant, the first plaintiff had to rely on the documentary evidence together with the oral evidence of the investigating officer to establish his case (see *Yew You & Anor v Mah Poay Koh & Anor*). Unfortunately, the learned magistrate had failed to consider this important aspect of the evidence and drew an inference on speculation. In *Johara Bi binti Abdul Kadir Marican v Lawrence Lam Kewok Fou & Anor* [1981] 1 MLJ 139 at p 142, his Lordship Chang Min Tat FJ said:

... But quite clearly, his decision was reached via an inference drawn entirely from a serious error of fact and in drawing this inference, he had not merely considered evidence which was not established but had failed to take into account the probative value of evidence which had been proved or was common to both parties. In these circumstances the inference he drew cannot be sustained and this court can and must come to the view, on the question of onus of proof, that the appellant had on a balance of probabilities, discharged the onus on her, the burden then shifted to the respondents and as held by the learned trial judge, the respondents had not discharged the burden even on a balance of probabilities and there should have been judgment for the appellant.

Had the learned magistrate considered that piece of documentary evidence, being the death certificate together with the second defendant's police report, it would have made some considerable difference to her conclusion where she held that the first plaintiff had not produced evidence as to the time when the accident occurred. The omission by the learned magistrate to consider the documentary evidence is fatal which no doubt has rendered her conclusion unsustainable and is against the weight of the evidence. In *Chung Hwa Ying v Phang Mun Mooi & Anor* [1987] 2 MLJ 693 at p 694, his Lordship Syed Agil Barakbah SCJ said:

... In normal cases, the appellate court is reluctant to interfere with the judge's conclusion on the facts because as a trial Judge he has the opportunity to see and hear the witnesses and is in a better position to weight their evidence. In the present appeal, however, he has failed to make proper use of this opportunity and has come to a wrong conclusion on the facts which in the circumstances necessitate this court to interfere and prevent a miscarriage of justice.

In *Sundram v Arujunan & Anor*, his Lordship Edgar Joseph Jr SCJ by a majority judgment said:

The subsequent conduct of the litigation by counsel for the defendants at the trial, in agreeing to the medical reports on the plaintiff 'as to maker and contents', which covered all injuries, including the head injury, confirms that counsel for the defendants was representing to the court and to his opponent, that causation with regard to the head injury, was no longer in issue.

A At this point, we would interpolate to observe, that the Orthopaedic Surgeon, Mr M Shanmugam, when referring to the history of the plaintiff's injuries, began his report by saying that the plaintiff 'was apparently a motorcyclist who was involved in a collision with a car ...'. The report by the neurophysician Dr C Bala Ratnam contains a statement to the like effect.

B Surely, if causation remained an issue, more particularly, if it remained an issue, whether the head injury was the direct result of the collision involving the plaintiff and the defendant driver's car or the direct result of a prior collision involving the plaintiff's motorcycle and the other motorcycle, the medical reports would never have been agreed by counsel for the defendants 'as to maker and contents'.

C As a result of relying on the representation aforesaid of counsel for the defendants, counsel for the plaintiff at the trial was induced to refrain from calling the medical witnesses — two from Kuala Lumpur and one from Penang — who we were told had been subpoenaed and were present in court, and whose testimony would have been most material to the issue of causation. In our view, therefore, *the agreement aforesaid was binding on counsel for the defendants and he should not now be allowed to resile from it.*

D *It follows, therefore, that the meaning and effect of the agreement aforesaid having regard to the common intention of the parties, was that causation was no longer in issue, when the trial commenced; the only remaining issue being negligence, in the sense of fault or blameworthiness, as between the plaintiff and the defendant driver, which eventually, the judge had decided in favour of the plaintiff on a 100% basis.*

E Having regard to our conclusions regarding the construction of the agreement aforesaid and the subsequent agreement, we would, on this ground alone, allow the appeal.

But, in our view, on two further grounds also, the appeal must succeed.

F Putting aside the agreement aforesaid, the second point we should like to consider concerns the pleadings in the case; more particularly, the defence filed.

Before us, the primary submission of counsel for the defendants was a denial of causation with regard to the head injury; more particularly, that that injury had been caused as a result of the prior collision involving the plaintiff and the other motorcycle.

G However, *this point was never pleaded with sufficient particularity, as it undoubtedly should have been.* The proper manner of pleading such a point appears in Atkins Vol 29, 1976 Issue, p 62, Form 48, where the precedent says:

H 'Further or alternatively the matters complained of were caused wholly by the negligence [and/or breach of statutory of duty] of X, Y.'

Indeed, if a defendant seeks to avoid liability by blaming a third party, the better practice is for him to plead it specifically instead of merely relying on a denial of negligence because the plaintiff might otherwise be taken by surprise (see Davie v New Merton Board Mills Ltd [1956] 1 All ER 379n).

I This is precisely what happened here. Relying on the agreement aforesaid, counsel for the plaintiff had assumed that causation was no longer in issue, the only issue remaining being negligence in the sense of blameworthiness or fault, and as a result, did not call the medical witnesses whose testimony on

causation, as we have already noted, would have been most material. He was thus taken by surprise when counsel for the defendants took up the causation point with regard to the head injury — a point which unfortunately commended itself to the judge.

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When, as here, there is no direct testimony as to how a collision had occurred and the plaintiff is left with no alternative but to rely on inferences, the general guidance given by Lord Loreburn in *Owners of Swansea Vale v Rice* [1912] AC 238, is worth bearing in mind:

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‘What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other.’

In *Jones v Great Western Railway* [1930] 144 LT 194, 202, Lord Macmillan explained the meaning of an inference and its effect in law, thus:

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‘An inference in the legal sense is a deduction from the evidence and if it is a reasonable deduction it may have the validity of proof.’

The question therefore arises, what is a reasonable inference? The answer to this question is provided by Lord Wright in *Caswell v Powell Duffryn Associates Collieries Ltd* [1940] AC 152 at p 169:

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‘Inferences must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.’

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In the present case, we are of the view that — in the words of Lord Wright in *Caswell’s* case — there were no objective facts from which it could be inferred, as a matter of reasonable probability, that the plaintiff had sustained the head injury as a result of falling to the ground following the prior collision with the other motorcycle. We accept, however, that upon the evidence, it was possible that he had sustained the head injury in that way. It was equally possible that he had not. So there was insufficient evidence to connect the head injury with the other motorcycle. In this context, we are reminded of the words of Suffian FJ (as he then was) in *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 at p 103 col 2F and F:

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‘There was no positive proof, as there was in the Granby case, *supra*, that the discharge from the defendant’s mine had anything to do with the death of the fish; there was only a possibility.’

With respect, it would, therefore, be pure conjecture or a mere guess, to say that the plaintiff’s head injury had been caused as a result of his falling to the ground following the prior collision with the other motorcycle. *And, it is axiomatic that the court is not entitled to guess.*

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But, on the contrary, there were objective facts in the shape of the admission in the defendant driver’s police report, corroborated by the testimony of two witnesses (PW2 and PW3) — accepted by the trial judge — and who, although not eye witnesses, had arrived on the scene soon after the collision and had seen the plaintiff lying across the white centre line with the imprint of a motorcar tire on his right trouser leg, which clearly indicated that the

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A defendant driver's car had, indeed, collided into the plaintiff while he lay on the road.

B In the absence of evidence to the contrary, and there was none — it could reasonably be inferred from the objective facts aforesaid that both the leg injury and the head injury had been caused by the collision involving the defendant driver's car. The next point to be logically considered in this context is the burden of proof.

C It is right to say at the risk of being trite that there is a distinction between the legal burden of proof and the provisional or evidential burden of proof. The distinction is well brought out by the late Mr OC Mazengarb QC, in his highly regarded work entitled *Negligence on the Highway, Law and Practice* (4th Ed) at pp 116 and 117, thus:

D 'A distinction is drawn between the 'legal burden' of proof which always rests on the plaintiff (or defendant in a cross-suit) and a provisional burden. The former is imposed by the law itself; the latter is a burden which is created by the state of the evidence. A piece of evidence may raise a 'presumption' or a 'prima facie' case in the sense that if nothing more is proved the court may (but not necessarily must) infer that there was negligence and may call upon the other party to answer that piece of evidence. But it is only a provisional burden which may be answered by evidence or by argument. It is not a compelling presumption; it is only a provisional one which may shift from one party to the other and back again as the case proceeds (see *Brown v Rolls Royce Ltd* [1960] 1 WLR 110).'

E In our view, regard being had to the circumstances of the case, once the plaintiff had established that he had been struck by the defendant driver's car, while he lay across the white centre line of the road, there was a prima facie case that both the leg injury and the head injury had been caused by the defendant driver's car.

F The provisional or evidential burden of proof, as opposed to the legal burden of proof, which had been raised by the state of the evidence, should then have shifted to the defendant driver to rebut the prima facie case, by showing, if he could, that only the leg injury but not the head injury, had been caused by him, since this was a matter especially within his knowledge. We are supported in this by s 106 of the Evidence Act (Revised 1974) which provides:

G 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.'

H Nevertheless, the defendant driver who was present in court and was the only person who had the necessary knowledge to testify as to the causation point had studiously elected not to give evidence. This omission by the defendant driver to testify should strengthen the inference that could reasonably be drawn from the facts proved by the plaintiff (see *R v Burdet* [1820] 4 B & Ald 95 at pp 161, 162; *Jones v Dunkel* [1959] 101 CLR 298).

I ... Thus, the trial Judge's finding on the issue of causation in favour of the defendant driver was against the weight of the evidence. We, therefore, reverse this finding made by him and substitute, in lieu thereof, a finding in favour of the plaintiff. The trial Judge, however, was correct in finding the defendant driver 100% to blame or at fault, for the collision and, indeed, a cross-appeal by the defendants on this issue was withdrawn.

By way of postlude, we must add a final point regarding this part of the case lest we be accused of an oversight. We recognise, as we must, that a Court of Appeal, will naturally be reluctant to interfere with a finding of fact by the trial Judge who has had the inestimable advantage of watching the demeanour of the witnesses, 'their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial.' (Per Lord Macmillan in *Watt v Thomas* [1947] AC 484, at p 4901). But, having said that, we could draw attention to the familiar principle that there is a distinction between the finding of a specific fact and the finding of a fact which is really an inference drawn from the facts specifically found. In the latter case – and the present case is such a case — the Appellate Court will be far more ready to reverse his decision founded as it is on inferences drawn from admitted or undisputed facts (see *Benmax v Austin Motors Co Ltd* [1955] AC 370). (Emphasis added.)

Accordingly, the learned magistrate ought to have found causation in favour of the first plaintiff and then proceeded to determine whether the first plaintiff had proved negligence against the second defendant which she had failed to do. In fact, there is nothing in the evidence to warrant the inference that the deceased was already dead when the second defendant's motorcar went over the deceased. On the contrary, there is evidence that the deceased died on his way to the clinic which remain unchallenged. The death certificate is prima facie proof of its contents and may be rebutted by other evidence. In the absence of evidence to the contrary, the contents of the death certificate is admissible evidence which has to be considered together with the other evidence (see *Tan Song Gou v Goh Ya Tian* [1983] 1 MLJ 60 at p 61). Further, it is also an admissible document under s 35 of the Evidence Act 1950 by virtue of being a public document under s 74 of the said Act.

Negligence

As to negligence, this court is of the view that any prudent driver who was confronted with a similar situation as faced by the second defendant as testified by him would have immediately slowed down, reduced the speed of his motorcar, applied its brake or even brought his motorcar to a complete stop towards the left side of the road especially on seeing people gathered at the scene where it was dark and after having seen 'satu benda' on the middle of the road at a distance of 13ft. The second defendant did not mention in his police report of having taken any evasive action on approaching the scene. The scratch marks to a distance of six metres as shown in the sketch plan, his other admissions in his police report and in his oral evidence in court for not being able to avoid the accident despite having seen the deceased at a distance of 13ft would tend to show that the second defendant must have been speeding and was not able to control his motorcar to bring it to a stop in order to avoid the collision. All these omissions and admissions on his part clearly establishes negligence against the second defendant and that he did not act as that of a prudent driver. There is admission by the second defendant by implication that had he

A applied the brake much earlier and had kept a proper look out, the accident could have been avoided. Further, during examination-in-chief, the second defendant has testified that he only applied the brake when he saw the deceased where it is stated 'Saya hanya tekan brek bila nampak mayat', although he has stated that he saw a group of people at the scene before he saw the deceased. Any reasonable and prudent driver would have slowed down and applied the brakes on seeing a group of people especially in a dark area which the second defendant had failed to do. During re-examination, the second defendant testified that on seeing the group of people, he focused his attention on the group of people which in fact would tend to show that he had deviated from his original attention to the traffic on the road. Would not all this admission lead to an inference that had he focused his attention in front and towards the road on which he was driving his motorcar, he would have seen the deceased lying on the road much earlier and in time to avoid the accident, a factor which goes towards negligence against the second defendant.

D In *Govinda Raju & Anor v Laws*, which was referred by the defendants' counsel, this court is of the view that the doctrine of 'agony of the moment' was applied by his Lordship Raja Azlan Shah J (as His Highness then was) based on the facts in that case. The plaintiff in that case took evasive action by swerving to the right in an attempt to avoid the accident when the motorcar from the opposite direction turned right and into the path of the plaintiff's motorcycle. It is not clear from the judgment in that case whether the agony of the moment was ever pleaded or submitted by the plaintiff's counsel. However, in the instant appeal, the second defendant's own admission shows that no evasive action was taken by him to avoid colliding into the deceased and the doctrine of 'agony of the moment' does not apply or assist the second defendant on the facts in the instant appeal. Accordingly, on the facts in the instant appeal, the learned magistrate ought to have found the second defendant negligent.

Power of appellate court to interfere with the finding of fact of a trial court

G As to the power of this court sitting in an appellate jurisdiction to interfere with the finding of fact of a trial court will all depend on what the basis was for the finding of fact. In the instant appeal, the decision of the learned magistrate was certainly not a finding based on specific facts, or depended largely on the credibility of conflicting witnesses or truth worthiness but on certain other reasons which as stated above was based purely on conjecture and speculation. This court is in a position to intervene where the decision reached was not on a specific fact but on conjecture. Further, there is nothing in the grounds of judgment of the learned magistrate that her decision was based on the credibility of the witnesses. Nevertheless, even if the issue of causation was based on credibility which it is not in this case, the question of inherent probability should also have been considered but was not. In *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 at p 38, his Lordship Syed Agil Barakbah SCJ (as he then was) said:

This is a case where the learned trial Judge has failed to take into account the probative value of the evidence which had been proved and in the circumstances we have to interfere (*Johara Bi v Lawrence Lam* [1981] 1 MLJ 139).

A

In *Burns v Devon's Iron Works Ltd* [1961] SC 102 at pp 102–108, Clerk Thomson LJ said:

B

The court is often charitable to records, and is slow to overturn verdicts on technical grounds. But when a pursuer fails completely to substantiate the only grounds of faults averred and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred (ie pleaded), but is something which is new, separate and distinct, we are not in a realm of technicality.

C

In *Chih Lim Neo v Sit Hoon Neoh* (1889) 4 KY 492, the Singapore Court of Appeal by a majority decision under held said:

... where the evidence preponderates in favour of the appellant, this court will act on such evidence and even reverse the judgment of the court below ... on a point of fact.

D

In *Woon Ngee Yew & Ors v Ng Yoon Thai & Ors* [1941] MLJ 37 at p 43, the Lord Chief Justice McElwaine (SS) said:

An appellate court should be very loath to differ on a finding of fact by a court which has seen and heard the witnesses but if the learned Judge can be shewn to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference it may be the duty of an appellate court to interfere.

E

In *Lofthouse v Leicester Corporation* *The Times Law Reports* 1948 Vol lxiv, Lord CJ Goddard said:

F

I have known cases where this court has interfered because it has thought that the judge who tried the case has decided how the accident happened not on the evidence given, but on how he thought that the accident probably happened.

G

In the case of *Sivalingham Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, his Lordship Gopal Sri Ram JCA said at pp 398–399:

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

H

In *Development & Commercial Bank Bhd v Num Tjuan Sdn Bhd* [1989] 1 MLJ 475, his Lordship Lee Hun Hoe CJ (Borneo) observed at p 477:

I

- A ... It is of course the duty of an appellate court to be a judge of fact as well as of law. At the same time it would be abrogating its function if it made a hard and fast rule never to interfere with the findings of fact and felt bound to support a judgment which, on review of all the evidence, it considered to be clearly wrong. The learned judge had given his reasons for disagreeing with the SAR.
- B (see *Lee Soh Hua v Kow Lup Piew & Ors* [1984] 2 MLJ 101 at pp 104–105)
In *Manager, Tuborg (Malaysia) Sdn Bhd v Public Prosecutor* [1990] 2 MLJ 173 at p 178, his Lordship Wan Yahya J said:
- C It has often been said that the appellate court should be slow in interfering with the findings of fact by a lower court, but where such findings are based on wrongful or unjust inferences drawn by the trial judge, then the appellate court would be abrogating its functions if it refuses to review the findings of the lower court.
- D (See *Benmax v Austin Motor Co Ltd* [1955] AC 370 which was followed in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd)* and another appeal [1996] 2 MLJ 517 and applied in *Mohd Samsudin Ismail v Tan Yeow Hwa & Anor* [2000] 7 MLJ 24.)
- E *Contributory negligence*
On the other hand and in view of the inference drawn by this court that the deceased must have been alive at the time when the second defendant's motorcar collided into him, this court is of the view that the deceased ought to have at least sought help to remove him away from the center of the road so as not to cause any undue danger to other vehicles approaching the scene of the accident especially when it was dark. However, there is no evidence that the deceased had made any such attempt to be removed to the side of the road. On the other hand, the deceased could also have been lying unconscious on the road. In any event, the deceased himself cannot be free from blame for having created such a situation that might endanger other road users including the second defendant. There must be some contributory negligence attached against him on the facts in the instant appeal. In *Ma Clyde v Wong Ah Mei & Anor* [1972] 2 MLJ 183, Gill FJ (as he then was) said at p 187:
- H It is to be observed that the rule at common law in relation to contributory negligence having been modified by s 12(1) of our Civil Law Ordinance 1956, which is in pari materia with s 1(1) of the English Law Reform (Contributory Negligence) Act 1945, the damages recoverable would have had to be reduced to the extent of the deceased's responsibility for the damage, if he himself had been proved to be negligent.
- I Accordingly, damages have to be reduced to the extent that liability is apportioned equally between the deceased and the second defendant (see

Lim Chai Oon & Anor v Normah bte Ismail & Anor [1994] 3 MLJ 105). A
Nevertheless, if this court had erred on the issue of negligence, it would be
for having held the deceased contributorily liable and for not attaching the
whole blame on the second defendant.

The defendants' counsel at the appeal before this court did not
seriously contest the issue of causation and negligence to its finality. In fact, B
towards the end of the submissions, this is what the defendants' counsel said
'Oleh itu, rayuan ditolak atau segi alternatif kecuiaan tidak lebih 30%
terhadap defendan'. If causation and negligence was seriously challenged by
the defendants' counsel to which he is entitled, why should he in the
alternative concede that liability be attached to not more than 30% against C
the second defendant and what is the basis of conceding to the extent of
30% liability against the second defendant if the second defendant did not
cause the death of the deceased at all. What the second defendant's counsel
could have expressly made clear during submissions with respect, in the
alternative is that in the event this court were to find that the second
defendant negligent and had in fact caused the death of the deceased, this D
court should not find the second defendant more than 30% liable for the
collision.

In conclusion, the reasonable inference that may be drawn from the
facts and circumstances in the instant appeal is that the first plaintiff has
established his claim against the second defendant both on causation and
negligence on the balance of probabilities. It is clear that the deceased met E
his death as a result of the injuries which he sustained, as per the
postmortem report, in the collision within the second defendant's motorcar
which went over his body when he was lying on the road.

Pleadings F

In view of the unsatisfactory nature of the pleadings in the instant appeal, it
is only appropriate for this court to make some observation. This court has
observed recently when hearing appeals from the lower courts, especially in
running down cases, that there is a blatant disregard and lack of seriousness
and the least importance is given to pleadings by some solicitors who
seemed to be too relaxed. By reading the original para 3 of the statement of
claim, it would appear that the second defendant collided into the deceased
from the rear at the time when the deceased was riding his motorcycle and
as a result it collided into the second plaintiff's bicycle. If this court were to
strictly follow the pleading as in the original para 3 of the statement of claim
and the evidence adduced during the trial, this court would have affirmed
the decision of the learned magistrate where she had dismissed the first
plaintiff's claim although not for the reasons as found by the learned
magistrate which was neither a finding of fact, nor a finding based on
inference drawn from the evidence in court but purely speculation and
conjecture. However, upon considering the amended para 3 of the
statement of claim which was allowed by the learned magistrate and the
statement of defence, this court proceeded with the appeal on the basis that I

A there was no issue that the second defendant's motorcar had in fact collided into the deceased when he was lying on the road, and after an earlier collision between the deceased's motorcycle and the second plaintiff. On that basis and with these facts in mind, this court proceeded to hear the appeal based on the cold print as contained in the record of appeal by way of a rehearing which is to read the evidence and rehear counsel.

B On the other hand, by para 1 of the statement of defence, both the defendants have pleaded they have no knowledge and have denied the contents of all the paragraphs in the statement of claim and have asked the plaintiffs for proof. In other words, the second defendant has completely denied that he ever collided into the deceased which is clearly and completely contrary to the second defendant's own evidence in court and in his police report exh (D1) that he had in fact collided into the deceased.

D Further, by para 2 of the statement of defence under particulars of negligence against the deceased-rider of the motorcycle, the defendants have pleaded as follows:

- (b) *Menunggang motorsikal No ACQ 789 pada tahap kelajuan yang berlebihan dan membahayakan dirinya sendiri;*
- (d) *Gagal menggunakan bereknya dalam masa yang cukup bagi mengelakkan kemalangan tersebut;*
- (e) *Gagal memperlahan, berhenti, menyimpang atau apa-apa cara mengendalikan motorsikal ACQ 789 supaya dapat mengelakkan kemalangan tersebut;*
- (f) *Menunggang motorsikal No ACQ 789 dengan gopoh dan melulu;*
- (i) *Gagal mengambil perhatian terhadap kod Lebuhraya dan Kaedah-Kaedah Lalulintas. (Emphasis added.)*

G It would appear from the said particulars of negligence as pleaded in the statement of defence, the deceased was riding motorcycle No ACQ 789 at the time when the second defendant collided into him which is entirely in conflict and a different version raised in the pleadings when compared to the second defendant's police report exh (D1) and his evidence in court which categorically states that the deceased was lying on the road and the second defendant's motorcar had dragged him to about ten feet before the second defendant had stopped his motorcar and got down to see the deceased. The statement of defence is in fact very unsatisfactory and misleading. The particulars of negligence as raised in para 2(b), (d), (e), (f) and (i) of the statement of defence would appear to be a defence to the original para 3 of the first plaintiff's statement of claim ie that the second defendant collided into the deceased when the deceased was riding his motorcycle. However, when para 3 of the statement of claim was amended by consent during the trial, perhaps the statement of defence should also have been amended accordingly but counsel who was in conduct of the case failed to do so.

In a civil case, a party need only prove facts that are in issue and this will be made known expressly by the statement of defence or reply or affidavit in reply. It is also trite law that parties are bound by their own pleadings and this has been said time and time again by the High Courts, the Court of Appeal and the Federal Court that litigants and solicitors should give importance to pleadings which are filed in court so that the court can decide their case on the pleaded facts. In the instant appeal, the issue that the deceased's death was not caused by the second defendant was not specifically pleaded. The denial was not sufficiently specific and did not clearly and definitely raise the issue that the deceased was already dead when the second defendant's motorcar collided into him. It has been said by our Superior Courts that merely raising general averments or denials in the statement of defence without being specific is insufficient and cannot assist the second defendant to constitute such a denial as defence to the issue of causation and that the defendants must state with sufficient particularity. In *Natesan v Goh Gok Hoon* [1968] 2 MLJ 3 at p 8, his Lordship HT Ong FJ (as he then was) said:

Above everything else is the fact that learned counsel for the appellant now sets up a case which not only is not founded upon, but contrary to, this appellant's own pleadings. We should be creating an absurd precedent to consider allowing this appeal, on any ground, without even any application for consequential amendment of the defence pleaded. Any amendment, at this stage, setting up a case which amounts to a volte-face, is naturally out of the question.

This court is of the view that the second defendant cannot use the general averments in the statement of defence to dispute the issue of causation unless it was raised or pleaded specifically which in turn would have put the first plaintiff on notice right from the beginning of the trial. In other words, there must be some form of material facts pleaded on which the defendants could rely to contest or dispute the second plaintiff's claim on the issue of causation and ought to have given particulars. Indeed, the second defendant should in the respectful view of this court, plead his own version of the fact and not merely deny the fact as pleaded in the statement of claim, as was done in the instant appeal.

In *How Paik Too v Mohideen* [1968] 1 MLJ 51 at p 52, his Lordship HT Ong FJ for the Federal Court allowed an appeal on the ground that the High Court judge who heard the appeal from the decision of the learned magistrate decided an issue that no demand for rent had been made by the landlord on the premises and that demand on the premises was necessary before rents could be lawfully due. However, this point was not pleaded in the statement of defence. His Lordship said:

With respect, I think the decision of the learned judge was wrong. In the first place, the point was never pleaded in the defence; consequently it was not a fact in issue requiring the magistrate to make any finding thereon.

- A In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, his Lordship Sharma J said:

... In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

- B
- C Lord Edmund-Davies in *Farrel v Secretary Of State For Defence* [1980] 1 All ER 166, at p 173 said:

For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

- D
- In *Haji Mohamed Dom v Sakiman* [1956] MLJ 45, his Lordship Mathew CJ said:

- E ... I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record, which in this case they were not, *Blay v Pollard & Morris* (at p 634).

In *Kayat & Anor v Lim Yew Seng* [1972] 1 MLJ 26, his Lordship Syed Othman J said at pp 26-27:

- F ... Where a defendant denies an allegation of fact in the pleading, he must not do so evasively, but answer the point of substance. *A denial must be specific (see Mallal's Supreme Court Practice Volume I at p 284)*. In this case the *denials of the defence are more of a general nature*. If in fact the defendant desires to deny that the driver named by the plaintiffs was the defendant's servant or agent he must do so in specific terms. (Emphasis added.)

- G In *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 at p 279, his Lordship Wan Suleiman FJ said:

The situation therein was therefore somewhat similar to that in the present appeal, for as was found in the judgment, the defendant was not misled, prejudiced or embarrassed or in any way taken by surprise. The Esso Petroleum decision, upon which the appellant relied so heavily was also distinguished. The House of Lords held there that:

- H
- I 'Every allegation in the statement of claim was rightly decided by the trial judge in a sense adverse to the foreshore owners, who had made no allegation of unseaworthiness, the shipowners could not be held responsible because they did not negative a possible case which was not alleged against them in the pleadings nor made against them in the course of the trial (see *Miskinah Bte Jaya & Ors v Mohamed Bin Salleh & Anor* [1984] 1 MLJ 187).'

In *State Government of Perak v Muniandy* [1986] 1 MLJ 490 at p 492, Hashim Yeop A Sani (as he then was) said: A

Parties are bound by their pleadings and we do not think that the appellant should on the admitted facts of this case be allowed to avoid vicarious liability merely on the bare fact that there was such an administrative circular relating to the prohibition. B

In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, Sharma J in his judgment at pp 196 and 197 said:

‘It was not open to the learned magistrate to fly off at a target as it were and disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. It was held by Scrutton LJ in the case of *Blay v Pollard & Morris*: ‘Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.’ C

This case was followed in our own Court of Appeal in *Haji Mohamed Dom v Sakiman* where Sir Charles Mathew CJ said: D

‘I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.

A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. E

...’ F

Both the authorities were cited with approval by the former Supreme Court. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 CLJ 667; ([1991] 1 CLJ (Rep) 239) where at pp 671 and 673 (at pp 244–246) Jermuri Serjan SCJ (as he then was) delivering the judgment of the court said: G

‘It does not seem necessary for us to emphasise and repeat the importance of pleadings in a civil suit castigating observations on which had been made from time to time in many cases in our courts. It is only a question of whether counsel, either because of negligence, inadvertence or call it what you will, choose to pay them scant or no heed at all and we must say that they do so at their peril. Recently, lapses in the strict compliance with the rules of pleadings occurred in our courts with marked frequency and we do not see how much lapses in the courts should be tolerated at the expense of the clients.’ H

Perhaps it would be sufficient and pertinent to repeat here in the hope that we have said the last words on this issue, what Raja Azlan Shah FJ (as he then was) said in *Chartered Bank v Yong Chan* at p 159: I

‘In my opinion the pleadings in the statement of claim are not in ideal form. If we are to maintain a high standard in our trial system, it is

- A indubitably not to treat reliance upon forms of pleadings as pedantry or mere formalism.'

And what Sharma J said in *Janagi v Ong Boon Kiat* at p 197:

- B 'A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, the constitution and the government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realise that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned magistrate had acted in less haste and had taken a little time to look up the law on the matter.'
- D

The observation of Lord Edmund-Davies in the case of *Farrel v Secretary of State* at p 173 are equally pertinent:

- E 'It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to pay an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable to take steps to deal with it.'
- F

- G Lastly, on the same topic, we would adopt the observations of Lord Radcliffe in *Esso Petroleum Co Ltd v Southport Corp* at p 241 where he said:

- H 'It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system.'

- I We need only to refer three recent cases where this court had to deal with similar issues to illustrate occurrences of lapses on the part of solicitors in the preparation of their pleadings with the resultant dire consequences. We refer to the recent appeal in this court which had occasion to decide the issue whether to allow a new point raised on appeal but not pleaded and argued in the High Court. In that case the court was unanimous in its

decision to refuse to allow the new point to be argued without calling for fresh evidence. Mohamed Azmi SCJ in delivering the judgment of the court in the case of *Muniandy & Anor v Muhamad Abdul Kader & Ors* said at p 418: A

‘Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191 (refd) at p 233: B

“Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...” C

Again on the same page the learned judge continued:

‘In our view these authorities do not appear to support the appellants’ application. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorised as falling within the realm of technicality. The so-called ‘omission’ is in fact a new line of defence altogether. The new defence based on equitable estoppel was never pleaded or argued in the courts below. The stand taken by the appellant throughout was that they were not trespassers because they were paying ground rents to Arumugam Pillai since 1963, and to the said ground tenancy, they claimed, albeit mistakenly, protection against eviction under the rent control legislation.’ D
E

In yet another very recent case the same issue fell to be determined by this court. Hashim Yeop A Sani CJ (Malaya) in delivering the judgment of this court quoted Muniandy’s case and Mohamed Azmi SCJ’s observations quoted above. At p 363 of the judgment the learned CJ said: F

‘The crucial issue of the application of the doctrine of severance should have been pleaded and argued before the learned judge and it would be wrong in our view to allow the alternative ground of appeal to be argued at this late stage.’

All these three cases deal with a similar point, ie that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal. G

In *Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65, his Lordship Gopal Sri Ram JCA who delivered the majority judgment observed that ‘the Statement of Claim is less than adequate as a perfect pleading.’ (see *Wisma Punca Emas Sdn Bhd v DR Donal R O’Holohan* [1987] 1 MLJ 393 at p 397, and *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152). H

In *Ting Jie Hoo v Lian Soon Hing Shipping Co* [1990] 2 MLJ 56 at p 58, his Lordship Chong Siew Fai J said:

Apart from the above observations on the pleadings, I have also considered the evidence of the witnesses and seen them giving evidence. I am inclined to believe the testimony of the plaintiff in this respect, and I find as a fact that at I

- A the material time in the morning of 7 September 1982, the plaintiff did the act of pulling the old wire-rope through the pulley of the crane and that in the course of so doing, he was injured when the boom of the crane fell from the top of the drum.

In *Blay Pollard And Morris* [1930] 1 KB 628 at p 634, Scrutton LJ said:

- B Case must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

In the circumstances, the statement of defence was of no assistance to the second defendant to raise causation as an issue to the first plaintiff's claim against the second defendant as it was raised without amending the pleadings and he was not entitled to take such a course.

C

Quantum

- D As to damages, the defendants' counsel in the instant appeal did not dispute that the first plaintiff is entitled to the claim for loss of support except as to the multiplicand. In fact, the defendants' counsel never even suggested to PW2 that his son was not employed and not receiving income. The defendants' counsel did propose a sum of RM50 per month to be reasonable and the multiplier to be seven years which amounts to RM4,200 as loss of support.

- E As to the $\frac{1}{3}$ deduction which was enunciated in *Takong Tabari* by the Court of Appeal, the defendants' counsel left it to the discretion of this court which again means he was not seriously proposing any deduction on the damages for loss of support. Notwithstanding this concession by the defendants' counsel, the decision or the principle enunciated in *Takong Tabari* is still binding on this court based on the doctrine of stare decisis.

- F Nevertheless, as the $\frac{1}{3}$ deduction is a matter of discretion based on the evidence, this court has a choice between *Takong Tabari* and the decision of another panel of the Court of Appeal in *Tan Phaik See (Ibu kepada Tan Hock San (si mati)) dan Tan Cheng Gek (Ibu Kepada Ng Chin Chai (si mati)) lwn Chuah Seng Boon* Civil Appeal No P04-14 of 1996 (Coram: Gopal Sri Ram JCA, Ahmad Fairuz JCA (as his Lordship then was) and presently the Rt Honourable Chief Justice Malaysia and Mokhtar Sidin JCA) where the Court of Appeal did not make $\frac{1}{3}$ deduction but decided for a 16 years multiplier).

- G This court took the liberty to follow the decision of the Court of Appeal in *Tan Phaik See v Chuan Seng Boon* which was followed by this court in *Kanan all Subramaniam & Anor v Aman Syah bin Abadzyuid* [2001] MLJU 630; [2002] 6 CLJ 34 at p 47. Further, there is also another unreported decision of the Court Appeal which allowed the multiplier to be 16 years in respect of claim by a widow in accordance with the statutory provision of the Civil Law Act 1956. The order of the Court of Appeal is now reproduced:

I

DALAM MAHKAMAH RAYUAN MALAYSIA
BERSIDANG DI PULAU PINANG
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO P04-18 TAHUN 1998

- Antara **A**
 NG SOO ANG
 (Isteri kepada LOW BOON HAI Simati sebagai Dependan) ... Perayu
 Dan
 CHAI CHUAN SENG ... Responden
 Dan
- NG SOO ANG **B**
 (Sebagai Pentadbir Harta Pusaka
 LOW BOON HAI) ... Pihak Ketiga
 Dalam Mahkamah Tinggi Pulau Pinang
 Melalui Rayuan Sivil No 12-87-96
 Antara
- NG SOO ANG **C**
 (Isteri kepada LOW BOON HAI simati sebagai dependan) ... Perayu
 Dan
 CHAI CHUAN SENG ... Responden
 NG SOO ANG
 (Sebagai Pentadbir Harta Pusaka
 LOW BOON HAI) ... Pihak Ketiga **D**
 Dalam Mahkamah Sesyen Butterworth
 Melalui Kes Sivil No 53-287-95
 Antara
- NG SOO ANG **E**
 Isteri kepada LOW BOON HAI
 Simati sebagai Dependan) ... Plaintiff
 Dan
 CHAI CHUAN SENG ... Defendan
 Dan
- NG SOO ANG **F**
 (Sebagai Pentadbir Harta Pusaka
 LOW BON HAI) ... Pihak Ketiga
- KORAM:
 YANG ARIF DATUK HAJI MOKHTAR BIN HAJI SIDIN HMR
 YANG ARIF DATO' ABDUL HAMID BIN HAJI MOHAMAD HMR
 YANG ARIF DATUK WIRA HAJI MOHD NOOR BIN HAJI AHMAD HMR **G**
- DALAM MAHKAMAH TERBUKA
 PADA 17HB JANUARI 2002
- PERINTAH
- RAYUAN INI ditetapkan untuk percabaran pada hari ini dalam kehadiran **H**
 Encik Baldev Bhar (bersama Encik DP Rajah), peguam bagi pihak perayu dan
 Encik Veerasamy Rajendran peguam bagi pihak responden DAN SETELAH
 MEMBACA Rekod Rayuan yang telah difailkan DAN SETELAH
 MENDENGAR hujah peguam-peguam tersebut ADALAH
 DIPERINTAHKAN bahawa:
- (1) Rayuan dibenarkan. **I**
 - (2) Multiplier dari lapan tahun dipinda ke 16 tahun dan Multiplicand yang
 telah diawadkan untuk sejumlah RM750 sebulan dikekalkan.

- A (3) Kos Rayuan di Mahkamah Rayuan diawadkan sejumlah RM500 dibayar oleh responden kepada perayu.
(4) Kos Rayuan dan Kos Rayuan Balas di Mahkamah Tinggi Pulau Pinang kepada perayu.
(5) Wang deposit yang dibayar oleh perayu dikembalikan.

B DIBERI di bawah tandatangan saya dan Meterai Mahkamah pada 17 Januari 2002.

tt
HASNAH DATO' MOHAMMED
HASHIM

C
PENDAFTAR
MAHKAMAH RAYUAN MALAYSIA
KUALA LUMPUR

D It is only appropriate to state at this stage that the unreported case *Teah Cheng Gaw v Elias Bin Abdul Ghani* vide Civil Appeal No R2-12-118 of 1997 which was referred to in *Kanan's* case, where the grounds of judgment were not made available at the time was a claim by the plaintiff for personal injuries and not a dependency claim as informed by counsel during submissions in *Kanan's* case, and as mentioned in that case. However, the grounds of judgment in *Teah Cheng Gaw's* case had recently been brought to the attention of this court in respect of another appeal where it was found that *Teah's* case was a claim by the plaintiff for personal injuries arising out of a road accident and not a dependency claim.

E It is also important to state that in *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99, the Supreme Court confirmed the decision of his Lordship Abdul Malek Ahmad J (as his Lordship then was) (see *Siti Rahmah bte Ibrahim v Marappan & Anor* [1989] 1 CLJ 252) where a 16 years multiplier was awarded to a living plaintiff in accordance with s 28A(2)(d) of the Civil Law Act 1956 even though both the parties had agreed and applied to record a multiplier of 15 years and there was no $\frac{1}{3}$ deduction. His Lordship Gunn Chit Tuan SCJ (as he then was) in delivering the judgment of the Supreme Court said:

G The legislature has made its intention very clear by using mandatory language in s 28A(2)(d) of the Act that 'in assessing damages for loss of future earnings the court shall take into account that in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16. The learned judge was therefore right in awarding a multiplier of 16 in this case'.

H (See *Latif bin Che Ngah & Anor v Maimunah bte Zakaria* [2002] 4 MLJ 266.)

I Incidentally, it is not inappropriate to state at this stage for the purpose of completion that in *Takong Tabari* the plaintiff had also sued as administratrix of the estate of Jeffrey Satuk Gabar, deceased. By stating that the plaintiff is the administratrix of the deceased's estate, she must have been clothed with the Grant of Letters of Administration to the said estate.

In that case, the 1/3 deduction on the loss of support was made against the estate of the deceased as the administratrix. Whereas in the instant appeal there is no evidence that the plaintiff has obtained the Grant of Administration to the estate of the deceased and the plaintiff's action is a dependency claim. Nevertheless, s 12(4) of the Civil Law Act 1956 expressly states that:

Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under s 8, the damages recoverable would be reduced under sub-s (1), any damages recoverable in any action brought for the benefit of the dependants of that person under s 7 or for the benefit of the husband of that person under proviso (iii) of sub-s (3) or of the spouse or parents under sub-s (3B) shall be reduced to a proportionate extent.

It is crystal clear from the wording in sub-s 4 of s 12 that damages have to be reduced if the deceased is also found to be at fault, even if an action is brought for the benefit of the dependants of the deceased, and the deduction is not limited to claims brought by an executor as defined in s 2 of the said Act or by persons who have obtained grant of letters of administration or probate to the estate of the deceased as decided in *Veronica Joseph (F), an infant and Anor v Tu Kon Lin and Anor* [1987] 1 CLJ 81. The reduction of the damages still applies according to the proportion of the deceased's liability even in a dependency claim by a spouse, parents and children as defined in sub-s 11 of s 7 to be read with sub-s 8 of s 7 of the said Act. Subsection 8 of s 7 of the said Act states:

If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.

Subsection 11 of s 7 states:

In this section unless the context otherwise requires:

'child' includes son, daughter, grandson, granddaughter, stepson and stepdaughter;

'parent' includes father, mother, grandfather and grandmother;

This court wishes to express its disappointment that *Veronica's* case as decided by the High Court is still being cited by some plaintiffs' counsel during the hearing of appeals in support of their arguments that no deduction should be made against the plaintiff in a dependancy claim for the fault of the deceased even though the Supreme Court in *Tu Kon Lin and Too Kow Hing v Veronica Joseph (f), an infant and Pamela Joseph (f), an infant and Anor* vide Supreme Court Civil Appeal No 332 of 1986 has varied

- A** the order of the High Court on appeal by the defendant. The Supreme Court has reduced the award of the High Court by 20% of the damages, ie from RM17,000 to RM14,000 which is approximately equal to the 20% contributory negligence against the deceased as previously found by the High Court 30D. For the purpose of easy reference, this court wishes to reproduce a copy of the sealed order of the Supreme Court in this judgement so that the High Court decision in *Veronica's* case will not be cited in support of opposing deductions on the damages in respect of a dependancy claim.
- B**

IN THE SUPREME COURT OF MALAYSIA HOLDEN AT
KUALA LUMPUR

C (Appellate Jurisdiction)

SUPREME COURT CIVIL APPEAL NO 332 OF 1986

Between

- D**
1. Tu Kon Lin
 2. Too Kow Hing
- ... Appellants
- And
1. Veronica Joseph (f), an infant
 2. Pamela Joseph (f), an infant by Cyril Augustus Joseph, their next friend
- ... Respondents

E In the matter of Malacca High Court
Civil Suit No 97 of 1979
Between

- F**
- 1 Veronica Joseph (f) an infant
 - 2 Pamela Joseph (f), an infant by
Cyril Augustus Joseph, their next
friend
- ... Plaintiffs
- And
- 1 Tu Kon Lin
 - 2 Too Kow Hing
- ... Defendants)

G CORAM:
THE HONOURABLE DATUK GEORGE EDWARD SEAH KIM
SENG SCJ
THE HONOURABLE TAN SRI DATO' HJ. MOHD AZMI BIN
DATO' HJ. KAMARUDDIN SCJ
H THE HONOURABLE TAN SRI DATO SERI S ABDOOLCADER
SCJ

IN OPEN COURT
THIS 5TH DAY OF MAY 1987

ORDER

- I** THIS APPEAL coming on for hearing on the 5 day of May, 1987 in the presence of Mr AC Vohrah of counsel for the appellants and Mr R Krishnan of counsel for the respondents AND UPON READING the Record of Appeal filed herein AND UPON HEARING counsel as aforesaid:

BY CONSENT IT IS ORDERED that the appeal be and is hereby allowed AND IT IS ALSO ORDERED that the order of the learned judge in the court below be varied to the extent that the award of damages be reduced from \$17,000 to \$14,000 AND IT IS FURTHER ORDERED that there be no order as to costs of this appeal AND IT IS LASTLY ORDERED that the sum of \$500 deposited into court as security for costs of the appeal be refunded to the appellants.

GIVEN under my hand and the seal of the court this 5 day of May 1987.

sgd

.....
SENIOR ASSISTANT REGISTRAR
SUPREME COURT MALAYSIA
KUALA LUMPUR.

It would appear that the decision of the Supreme Court in *Veronica's* case was not brought to the attention of the Court of Appeal in *Rubaidah bte Dirin (Suing as widow of Basia bin Bahari, deceased, on behalf of herself and the dependants of the deceased) v Ahmad bin Ariffin* [1977] 1 MLJ 677 although it did not follow the High Court decision in *Veronica's* case. The Supreme Court's decision in *Veronica's* case was also not brought to the attention of the High Court in the following cases by counsel as a result there seemed to be conflicting views on the issue of reduction in damages in a dependency claim if the deceased is also found to be at fault.

- (1) *Maimunah bte Hassan v Marimuthu (Sebagai Wakil Harta Pusaka Rozita bte Khamis) & Satu Lagi v Marimuthu s/o Samanathan & Satu lagi* [1993] 1 CLJ 119 (*Veronica's* High Court decision not referred);
- (2) *Lim Chai Oon & Anor v Normah bte Ismail & Anor* (*Veronica's* High Court decision not followed);
- (3) *Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal* [1996] 1 MLJ 576 (*Veronica's* High Court decision followed);
- (4) *Balachandran s/o Samy & Anor v Chew Man Chan & Anor* [1995] 4 MLJ 685 (*Veronica's* High Court decision followed).

Be that as it may, the defendants' counsel have contended that if the contents of the death certificate is accepted as evidence, and which has in fact been admitted as evidence, it would show that the deceased was a student. This issue again was not taken up seriously or raised or even challenged at the trial or during submissions or even at the appeal. The fact that the deceased was a student makes no difference to the plaintiffs' claim for loss of support because the plaintiff, PW2, the father of the deceased, has clearly stated in his evidence that the deceased worked part-time after school hours between 3–6pm. Again it was put to PW2, during cross-examination by the defendants' counsel that since the deceased paid for his own expenses, he was not giving PW2 the sum of RM200 per month which would lend support to the fact that there is no dispute that the deceased was in fact earning although he was a student. Further, it was never suggested

A or put to PW2 that the deceased was not employed and not receiving wages. Further still, the evidence of PW3, the employer of the deceased supports PW2's evidence that the working time of the deceased was between 3–6pm which is after school hours. Based on all this evidence, it cannot be disputed that the deceased was gainfully employed at the time of his death.

B In *Chan Chin Min & Anor v Lim Yok Eng (Lawful Mother of Gan Swee Hock, deceased)* [1994] 3 CLJ 687 by a majority decision, the Supreme Court said that in the case of claim for loss of support by a parent of the deceased, the multiplier of 16 years as provided in s 7(3)(iv)(d) does not apply and each case would depend on the facts especially the age of the deceased and the court must take into consideration that had the deceased

C if he continued to live he might have married in his later years and as a result his contribution might diminish or lessen (see *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 and *Siti Ajar Mat Zain v Cindy Teoh & Anor*). The Supreme Court in *Chan Chin Min's* case have in fact drawn a distinction between a claim by a widow and children for loss of support as a result of a husband/father's death and a claim by the parents of a deceased person

D whose claim is also for loss of support.

As for quantum, a sum of RM75 per month for ten years amounting to RM7,800 as loss of support, RM10,000 towards bereavement and a sum of RM2,000 as funeral expenses is awarded to the plaintiff.

E Incidentally, this court has noted that the evidence at p 18 of the record of appeal under examination-in-chief of PW2, the father of the deceased which states 'Pada 10 Julai 1996 saya ada terlibat dalam satu kemalangan maut' could have inadvertently left out the word anak saya and not saya because the evidence follows 'Akibat daripada kemalangan jalanraya, anak saya meninggal dunia. Nama anak saya Puniamoorthy a/l Muniandy.

F Be that as it may, much time and avoidable appeals would be saved if only judicial officers in the lower courts were to take some pains to write more detailed reasons in the grounds of judgment as this would assist solicitors in advising their clients as to whether an appeal ought to proceed (see *English v Emery Reimbold & Strick Ltd Dj & Winthers (Farms) Ltd v Ambic Equipment Ltd, Verrechia (trading as Freight Master Commercials) v Commissioner of Police of the Metropolis* [2003] 3 All ER 385). It would also assist this court at the hearing of the appeal to decide whether the evidence supports the reasoning of the lower court or if there has been an error. In *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71, the Federal Court chaired by his Lordship Suffian LP said:

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The learned trial judge was concerned to determine who was telling the truth, but we sitting in an appellate court are concerned to determine not so much the truth as whether there had ever been error on the part of the trial judge. (Emphasis added.)

I In the circumstances, first plaintiff's appeal is allowed. The decision of the learned magistrate which dismissed the first plaintiff's claim is set aside. The first plaintiff has succeeded in establishing his claim against the second

defendant on causation, negligence and damages. However, the deceased had also contributed towards the accident and damages is reduced to the extent of 50% in contributory negligence as against the deceased. Deposit of the appeal is ordered to be returned to the first plaintiff's solicitors. Costs as agreed by both parties for this appeal is RM1,000 to be paid to the first plaintiff's solicitors.

Appeal allowed.

Reported by Lim Lee Na

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